IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-601

THE FOUKE COMPANY,
Petitioner,

and

JUANITA KREPS, Secretary of Commerce of the United States, *et al.*,
Defendants,

v.

ANIMAL WELFARE INSTITUTE, *et al.*,
Respondents.

THE FOUKE COMPANY,
Petitioner,

and

JUANITA KREPS, Secretary of Commerce of the United States, *et al.*,
Defendants,

v.

COMMITTEE FOR HUMANE LEGISLATION, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Fouke Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 27, 1977.

OPINION BELOW

Animal Welfare Institute v. Kreps, No. 76-2148; and *Committee for Humane Legislation, Inc. v. Kreps*, No. 76-2149, ____ U.S. App. D.C. ____, ____ F.2d ____ (1977), attached to this petition at Appendix 67a.

JURISDICTION

The judgment of the Court of Appeals was entered July 27, 1977. This Court has jurisdiction on certiorari pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can the Marine Mammal Protection Act, by itself and independent of constitutional requirements of Article III, confer standing on animal-welfare organizations to challenge a waiver of the Act's import moratorium, and, if not, are Article III requirements met where no organization member has acted or is likely to act on the asserted interest in marine mammals, and where the asserted injury results, if at all, from actions of a foreign government not a party to the litigation?

2. Where the Act authorizes and directs the Commerce Secretary to apply wildlife management principles in determining whether Cape fur seals are under eight months old or nursing at the time of taking, did the court of appeals' rejection of the Secretary's determinations based on such principles overstep proper limits of judicial review and thereby undo Congress' provision for waiving the Act's import moratorium?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. U.S. CONST. art. III, §2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States, and * * * to Controversies to which the United States shall be a Party * * *.

2. Marine Mammal Protection Act of 1972 §§2, 101, 102, 104, Pub. L. No. 92-522, 86 Stat. 1027, Oct. 21, 1972, 16 U.S.C. §§1361, 1371, 1372, 1374.

(a) Section 2(5) and (6):

> The Congress finds that –
>
> * * *
>
> (5) marine mammals and marine mammal products either –
>
> (A) move in interstate commerce, or
>
> (B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce,
>
> and that the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and
>
> (6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource managment and that the primary objective of their management should be to maintain the

health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the optimum carrying capacity of the habitat.

(b) Section 101(a)(3)(A):

(a) There shall be a moratorium on the taking and importation of marine mammals and marine mammal products * * * during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

* * *

(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this Act to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 102, 103, 104, and 111 of this title permitting and governing such taking and importing, in accordance with such determinations: *Provided, however*, That the Secretary in making such determinations, must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of

this Act: *Provided further, however*, That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this Act. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.

(c) Section 102(b)(2), (c)(1)(A) and (2)(A):

(b) * * * [I]t is unlawful to import into the United States any marine mammal if such mammal was –

* * *

(2) nursing at the time of taking, or less than eight months old, whichever occurs later;

* * *

(c) It is unlawful to import into the United States any of the following:

(1) Any marine mammal which was –

(A) taken in violation of this title;

* * *

(2) Any marine mammal product if –

(A) the importation into the United States of the marine mammal from which such product is made is unlawful under paragraph (1) of this subsection * * *.

(d) Section 104(a) and (d)(6):

(a) The Secretary may issue permits which authorize the taking or importation of any marine mammal.

* * *

(d) * * *

(6) Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit. Such review, which shall be pursuant to chapter 7 of title 5, United States Code, may be initiated by filing a petition for review in the * * * United States District Court for the District of Columbia, within sixty days after the date on which such permit is issued or denied.

3. Commerce Department Regulations, 41 Fed. Reg. 7510 (1976), 50 C.F.R. §216.32 (1976):

§216.32 Waivers of the moratorium.

(a) *Waiver.* The moratorium on importation is waived to permit the importation of up to 19,180 skins of Cape fur seals (*Arctocephalus pusillus pusillus*) harvested within the Republic of South Africa and harvested by or under the auspices of the Republic of South Africa and under the following conditions:

* * *

(3) The skins were taken from Cape fur seals which at the time of taking were not:

(i) nursing;

* * *

(iii) less than eight months old.

(d) *Definitions.* In addition to the definitions contained in the Act, these regulations, and unless the context otherwise requires, in this section:

* * *

(2) "Eight months old" means eight months old as determined using a mean birthdate for the Cape fur seal of December 1 for any one pupping season.

* * *

(4) "Nursing" means nursing which is obligatory for the physical health and survival of the nursing animal.

STATEMENT OF THE CASE

This Petition seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit holding (1) that Respondents, eight animal-welfare organizations, have standing to challenge the Commerce Secretary's waiver of the Marine Mammal Protection Act (MMPA) moratorium on importing skins from Cape fur seals harvested in South Africa, and (2) that the Secretary's waiver contravened the MMPA.[1] Respondents challenged the waiver in the district court and Petitioner, a sealskin processor, intervened as a party defendant.

Section 101(a)(3)(A) of the MMPA imposes a moratorium on importing sealskins, except upon a waiver granted by the Secretary and a permit issued pursuant to regulations implementing the waiver. Following public hearings in which Respondents, Petitioner, and others participated, the Director of the National Marine Fisheries Service[2] issued a decision and

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[1]Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027, Oct. 21, 1972, 16 U.S.C. §§1361-1407 (Supp. V, 1975).

[2]The Commerce Secretary delegated his authority under §3(12)(A) of the MMPA to the Director, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce. 38 Fed. Reg. 4793 (1973).

published implementing regulations waiving the moratorium to allow importation of skins of Cape fur seals harvested in South Africa.[3] The waiver contained conditions prescribed in subsections 102(b)(2) and (c)(2) of the MMPA that the skins come from seals that were not nursing or less than eight months old at the time of taking.[4] It also contained, as required by subsection 101(a)(3)(A), the Director's certification that the South African government's program for taking Cape fur seals is consistent with the provisions and policies of the MMPA.[5]

On March 24, 1976, Respondents filed suit against the Secretary and the Director challenging the waiver on the grounds, among others, that it allowed importation of skins from seals that were nursing or less than eight months old at the time of taking and that South Africa's harvesting program was not consistent with the provisions and policies of the MMPA. Asserting jurisdiction under 28 U.S.C. §§1331, 1337, 1361, and 5 U.S.C. §§701-706, they alleged (Complaint, para. 10):

> The Plaintiff organizations bring this action on behalf of themselves and their members, each of whom has a personal stake in the maintenance of a safe, healthful and productive environment and in the protection of marine mammals. The decision

[3] 41 Fed. Reg. 7510 (regulations), 7537 (decision) (1976). The regulations are codified at 50 C.F.R. §216.32 (1976).

[4] 50 C.F.R. §216.32(a)(3)(i), (iii).

[5] 41 Fed. Reg. at 7539, App. 54a. The Director's decision (attached at Appendix 41a) adopted, with modifications, the initial decision of the Administrative Law Judge (attached at Appendix 1a) who conducted public hearings on September 18-20 and 22-24, 1975.

> of the Defendants described herein will contribute to the death and injury of marine mammals and injury to the ecosystem of the South Atlantic Ocean. The Defendants' decision will cause the members of the Plaintiff organizations injury and will adversely affect them in one or more of their activities or recreational pursuits. The decision impairs the interests of the Plaintiff organizations and their members in observing and studying marine mammals including the Cape fur seal. Through sanctioning the seal harvesting methods of the South African Government, the Defendants' decision impairs the ability of members of the Plaintiff organizations to see, photograph, and enjoy Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to excessive harvesting, inhumane treatment and slaughter of pups that are very young and still nursing. The Defendants' decision impairs the efforts of the Plaintiff organizations and their members to assure the carrying out of sound conservation practices with respect to the Cape fur seal, in accordance with the MMPA. The decision impairs their efforts to assure humane treatment of marine mammals in conformity with the Act. The MMPA was enacted in response to public outcry against the commercial exploitation of very young and still nursing marine mammals, particularly seals. The Defendants' decision impairs the interests of the Plaintiff organizations and their members in seeing to it that the provisions of the MMPA are given full effect in accordance with the mandate of Congress.

Petitioner and the Government denied these allegations.

Respondents moved for a preliminary injunction based on the administrative record. The Government

and Petitioner opposed the motion on the merits and on the question of Respondents' standing. Respondents submitted five affidavits on the standing question. The affidavits showed that two members of Respondent organizations observed Cape fur seals in South Africa in 1975. Both persons were there to monitor the seal harvest, not to enjoy seal-watching. The only other evidence pertaining to the alleged esthetic interest of Respondents' members was contained in one of the affidavits, which stated:

> 2. On November 22, 1976, I received a letter from Colin Platt, a member of The Humane Society of the United States, who is currently in the Republic of Panama supervising Operation Noah II, an operation undertaken by conservation organizations to save from drowning members of rare species of fauna whose habitat is in an area now being flooded by the Government of Panama to create the Bayano Reservoir.
>
> 3. In his letter, Mr. Platt advised me that he intends, assuming his safe return from Panama, to travel to South Africa during the summer months (July-October) of 1977 for the purpose of observing the Cape fur seal, *Arctocephalus pusillus pusillus*, in its natural habitat on the Western coast of South Africa.

The district court considered the affidavits, but held the "assertion of interference with an interest in studying the Cape fur seal is speculative at best." The court dismissed the action for lack of standing. The court's Memorandum and Order of December 23, 1976, attached at Appendix 63a to this Petition, stated in relevant part:

> It is important to note that what is before the Court is the determination of how Plaintiffs will be injured by the action of the Defendants. * * *

> There is nothing on this record to show that Plaintiffs, however great their interests are, are on any different footing from any other concerned citizen. Such generalized harm as Plaintiffs allege does not normally warrant exercise of jurisdiction. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). Absent a statute that authorizes suits by concerned citizens functioning as "private attorneys generals," the Court must follow the strict standing requirements as laid down by the Supreme Court in *Sierra Club v. Morton, supra* and subsequent cases. (Footnotes omitted.)

Respondents appealed on the standing issue and on the merits. The court of appeals reversed the district court on standing; it held that the waiver contravenes the MMPA strictures against taking seals that are under eight months old or nursing, and on this basis rejected the Secretary's certification that South Africa's harvesting program is consistent with the provisions and policies of the MMPA.

REASONS FOR GRANTING THE WRIT

1. On the question whether Respondent organizations have standing to challenge the administrative decision, the holding below directly conflicts with this Court's constitutional holdings in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); and *Sierra Club v. Morton*, 405 U.S. 727 (1972). The decision should be reviewed.

2. On the merits, the court below overturned the Commerce Secretary's application of key provisions of important new legislation—the Marine Mammal Protec-

tion Act. In doing so, the court disregarded the Act, the administrative record, and the Secretary's expertise. The federal questions involved have broad ecological and economic impact and require this Court's authoritative adjudication.

I.

CONFLICT WITH SUPREME COURT DECISIONS ON STANDING

The court of appeals upheld Respondents' standing on two alternative grounds—the MMPA itself and "traditional" Article III grounds. Neither ground is valid. The notion that a statute may confer standing without regard to Article III requirements is flatly contrary to the decisions of this Court. The findings under Article III that Respondents sustained injury in fact and that the Secretary's waiver caused the injury are based on facts legally indistinguishable from facts this Court has held constitutionally insufficient to confer standing.

A. Standing Cannot Be Conferred Solely by Statute.

The court of appeals held that "the MMPA itself confers standing" on "any party opposed" to a waiver of the moratorium. Its opinion stated:

> [T]he Supreme Court has held that the injury required by Article III may exist solely by virtue of a statute * * *. A finding that Congress has expressly, "or by clear implication," conferred standing on appellants would thus obviate the other inquiries.[6]

[6] Slip Opinion at 6, App. 72a (footnote omitted).

The decision below confuses the prudential limitations on standing, which are "essentially matters of judicial self-governance,"[7] with the constitutional limitations. While a statute can overcome the prudential limitations,[8] it cannot obviate the Article III inquiry. As this Court stated in *Warth v. Seldin*, 422 U.S. 490, 501 (1975):

> * * * Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.

The court of appeals concluded that Respondents need only show that they are "parties opposed" to the MMPA waiver without a further showing that they suffered actual injury caused by the waiver.

B. Respondents Showed No Injury in Fact.

Respondents alleged injury to an interest in seeing, photographing, and enjoying "Cape fur seals alive in their natural habitat." The claim of standing rests on Respondents' status as representatives of "members who have been injured in fact, and thus could have brought suit in their own right."[9] But only two of Respondents'

[7] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 45 (1976).

[8] *See* cases cited in Warth v. Seldin, 422 U.S. 490, 499-500 (1975). For example, a statute creating a new protectible interest or granting a right of judicial review to a person who shares a grievance with many other citizens may overcome the prudential limitations. *Ibid.*

[9] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. at 40.

members visited South Africa. Neither went to pursue the asserted interest; both went to monitor the 1975 seal harvest.[10] This showing failed to meet Article III's requirement that the party himself (in this case Respondents' members) be among the injured:

> [T]he "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.[11]

Respondents also submitted an affidavit of a member stating she had received a letter from another member in 1976 stating his intention, "assuming his safe return from Panama," to observe Cape fur seals in South Africa the following year.[12]

The district court correctly characterized Respondents' assertion of injury as speculative.[13] In reversing the district court, the court of appeals held that the two harvest-monitoring visits and the expression of contingent intent to observe Cape fur seals in the future show injury to a protectible interest under Article III. But the two visits showed no injury because they were not made in pursuance of the asserted interest; the

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[10]Monitor Ex. 6, Hearing Tr. 688; Animal Rights Ex. 1, Hearing Tr. 165, 175; *In re* Application of The Fouke Co., United States Department of Commerce, NOAA, NMFS Docket No. MMPAH No. 1, 1975 (hereinafter cited as Admin. Rec.). One of the two members went solely to oppose the waiver, *id.*, Hearing Tr. at 649, and the other to study the killing methods involved in the South African seal industry, Animal Rights Ex. 1, para. 9.

[11]Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

[12]The substantive paragraphs of the affidavit are quoted in full at p. 10, *supra*. The letter itself, of course, is hearsay; the member with the alleged intent to watch seals filed no affidavit.

[13]Memorandum and Order, App. 65a.

contingent intent is no more than an assertion that one of Respondents' members "can imagine circumstances in which he could be affected by the agency's action."[14]

The administrative record before the court showed that coastal seal colonies are situated in diamond fields forbidden to the public except on permit and that island rookeries are remote and difficult to reach.[15] In holding Respondents' allegations of injury speculative, the district court found that "the Cape area for various reasons, is well protected and accessible only with the special permission of the South African Government."[16] The court of appeals misconstrued this finding as imposing a burden on Respondents to prove their members could obtain permission and access to observe the seals.[17] But the district court imposed no such burden; it simply found as a fact that in view of the difficulties and contingencies incident to seal-watching in South Africa, Respondents had failed to show the "immediate or threatened injury" to their members that Article III requires.[18]

C. There Is No Causal Relation Between the Waiver And Respondents' Alleged Injury.

In its latest decisions on standing, this Court has held that, when a plaintiff's asserted injury results from actions of a third party not before the court, the

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[14]United States v. SCRAP, 412 U.S. 669, 689 (1973).

[15]Hearing Tr. 313, Admin. Rec.

[16]Memorandum and Order, App. 65a.

[17]Slip Opinion at 12, App. 78a.

[18]Warth v. Seldin, 422 U.S. at 511.

plaintiff must make a substantial showing that such actions were caused by a defendant and that judgment against the defendant will effectively redress the injury. As stated in *Simon v. Eastern Kentucky Welfare Rights Organization:*

> [T]he "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.[19]

As stated in *Warth v. Seldin*, indirectness of the asserted injury

> may make it substantially more difficult to meet the minimum requirement of Art. III to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.[20]

The court of appeals tried to distinguish *Simon* as a tax case requiring special treatment;[21] but *Simon*, like *Warth* and *Linda R. S. v. Richard D.*,[22] states principles grounded not in tax law but in Article III.

Cape fur seals are harvested exclusively by the South African government and its concessionaires.[23] Respondents' injury results, if at all, from the seal-harvesting practices of South Africa. The United States, of course, cannot regulate the practices of a foreign sovereign.

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[19]426 U.S. at 41-42.

[20]422 U.S. at 505.

[21]Slip Opinion at 16n.42, App. 82a.

[22]410 U.S. 614 (1973).

[23]*See* 50 C.F.R. §216.32(a)(1); Initial Decision, App. 23a.

While the waiver provision offers a market incentive to foreign governments to improve marine mammal conservation so that products may be sold here, the MMPA cannot be expected directly to halt or drastically alter South Africa's sealing operations. South Africa administers its own Sea Birds and Seal Protection Act and has maintained a seal management program since 1893.[24] The record shows that South Africa can sell its sealskins in other established markets and that even if there were no other market, South Africa would continue harvesting at about the present rate in order to protect its fish stocks.[25] The record supports the administrative finding that more restrictive waiver conditions would bring about no substantial changes in South Africa's sealing practices and might well be counterproductive.[26] Indeed, the NMFS Draft Environmental Impact Statement stated that stricter conditions "may prompt the South African government to proceed with a harvest similar to previous years without regard for U.S. requirements."[27] The court of appeals did not suggest that any of these findings was clearly erroneous or without basis in fact. It simply disregarded them and substituted its own.

In *Simon*, this Court considered the issue of standing in the context of a government program designed to encourage third parties to adopt socially desirable

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[24]Initial Decision, App. 23a.

[25]Letter from J. S. F. Botha to Henry L. Heyman, July 19, 1973. Appl. Ex. 2, App. F, Hearing Tr. 71, Admin. Rec. The fishing industry in South Africa finds seals a menace to fishing and favors a drastic reduction in the seal population. Appl. Ex. 2, App. P at 35-36, Hearing Tr. 71, Admin. Rec.

[26]Initial Decision, App. 22a.

[27]Appl. Ex. 2, App. P at 38, Hearing Tr. 71, Admin. Rec.

practices. There, indigent plaintiffs who had been denied treatment at tax-exempt hospitals sued the IRS for relaxing its "charitable organization" rules in a way that permitted the hospitals to refuse service to indigents. This Court, holding that plaintiffs had no standing, stated:

> It is purely speculative whether the denials of service specified in the complaint fairly can be traced to [IRS] "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications.[28]

The hospitals were not before the court, and no injury caused by them could be redressed by the court. Similarly here, the injuries complained of result not from administrative action by the Secretary of Commerce but from South Africa's seal harvesting. South Africa is not a party before the court, and no injury caused by South Africa can be redressed by the court.

No causal connection between the waiver decision and the asserted impairment of Respondents' seal-watching has been shown in any concretely demonstrable way, as required by this Court's holding in *Warth v. Seldin*.[29] There, certain plaintiffs claimed their inability to obtain low-cost housing stemmed from defendants' zoning restrictions. This Court held they lacked standing to challenge the zoning restrictions, in the absence of allegations: (a) that, but for the restrictions, they could with substantial probability have obtained low-cost housing, and (b) that the judicial relief requested would enable them to obtain such

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[28] 426 U.S. at 42-43.

[29] 422 U.S. at 504.

housing.[30] Here, Respondents do not show that, but for the waiver, their members would have been able to enjoy seal-watching in South Africa. Nor do they show that judicial invalidation of the waiver will enable them to enjoy such seal-watching.

The court of appeals decision on standing conflicts with this Court's constitutional decisions; it should be reviewed.

II.

ADMINISTRATION OF THE MARINE MAMMAL PROTECTION ACT

The MMPA is an important federal statute not yet reviewed by this Court.[31] It establishes a national policy on marine mammals and their products; it affects the environment and commerce nationally and internationally. During the congressional consideration of marine-mammal legislation, animal-welfare proponents contended for an absolute ban against taking and importing marine mammals.[32] Congress rejected that approach:

> The basic issue before the Committee was whether to ban outright the killing of any marine mammal under the jurisdiction of the United

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[30] *Id.* at 506-07.

[31] The MMPA has engendered substantial litigation, *e.g.*, Diggs v. Richardson, ____ U.S. App. D.C. ____, 555 F.2d 848 (1976); Committee for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297 (D.D.C.), *aff'd*, ____ U.S. App. D.C. ____, 540 F.2d 1141 (1976); Fouke Co. v. Mandel, 386 F. Supp. 1341 (D. Md. 1974).

[32] *See, e.g., Hearings on H.R. 690 Before Subcomm. on Fisheries and Wildlife Conservation, House Comm. on Merchant Marine and Fisheries*, ser. 92-10, 92d Cong., 1st Sess. (1971).

> States, or whether the government should continue to allow supervised and restricted taking of certain mammals. No doubt, a sizeable segment of public opinion in the United States opposes the indiscriminate slaughter of marine mammals. But a strong body of evidence was presented to the committee that total and complete protection without scientific management is not necessarily the best answer to solving the problems of marine mammals. * * *[33]

Congress also recognized in section 2(5) that protection and conservation of marine mammals is "necessary to insure the continuing availability of [their] products which move in interstate commerce." The Senate report said, "The whole concept" of providing authority to waive the moratorium under section 101(a)(3)(A) "is to give the Secretary leeway to act."[34]

The MMPA must, of course, be interpreted in light of its subject matter.[35] Whether a seal is eight months old or nursing are not matters that can be determined with certainty. The Secretary's determinations were made as Congress intended, by methods developed and recognized in the specialized field of wildlife management and conservation. In granting waiver authority to the Commerce Secretary, the statute enjoins him to use scientific evidence and to have due regard for such matters as the distribution, abundance, and breeding habits of marine mammals (§101(a)(3)(A)). The court

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[33] S. REP. NO. 92-863, 92d Cong. 2d Sess. 5 (1972) (hereinafter cited as S. REP.); *see* H. REP. NO. 92-707, 92d Cong., 1st Sess. 19 (1971).

[34] S. REP. at 7.

[35] *See, e.g.*, Lichter v. United States, 334 U.S. 742, 785 (1948); American Power & Light Co. v. S.E.C., 329 U.S. 90, 104 (1946).

of appeals overturned the Secretary's determinations, substituted its own *a priori* judgments, and thereby undid Congress' provision for waiving the moratorium. The importance of administering key provisions of the MMPA and the court of appeals' departure from established standards of judicial review require this Court's authoritative adjudication.

A. The Age Provision.

Subsections 102(b)(2) and (c)(2) of the MMPA prohibit importing products from marine mammals less than eight months old at the time of taking. The statute and legislative history prescribe no formula for determining the age of such mammals. Congress provided that "sound policies of resource management" are to be used; it committed such determinations to the Secretary of Commerce using wildlife management principles.

Cape fur seals are born in the wild; no one is present to observe or record their births. There is no way to know an individual seal's birth date the way one knows a human's birthday. In wildlife management, defining an animal's age by reference to the mean birth date of its generation is an accepted method of age determination.[36] This was the method the Secretary used to determine the age of Cape fur seals.[37]

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[36] Director's Decision, 41 Fed. Reg. at 7538, App. 51a; *see* literature cited in Appl. Ex. 2, Apps. W, X, and Y, Hearing Tr. 71, Admin. Rec. Congress recognized that human reproduction concepts cannot apply in wildlife management. In an analogous context, the legislative history notes that the prohibition against taking "pregnant" animals cannot be taken literally. The House and Senate conferees stated their intent "that the term 'pregnant' be interpreted as referring to animals pregnant near term or suspected of being pregnant near term as the case may be." Conference Report, H. R. REP. NO. 92-1488, 92d Cong., 2d Sess. 24 (1972).

[37] 50 C.F.R. §216.32(d)(2).

Cape fur seals are born each season in the last half of November and the first half of December. Statistically, about 5 percent are born by November 14, 50 percent by December 1, 70 percent by December 4, and 95 percent by December 18. The mean birth date is December 1; thus, the seals are eight months old by the following August 1.[38] Sealskins are imported into the United States from a harvest that begins in August and extends well into October, ceasing before the start of the breeding season when the rookeries should not be disturbed and when weather conditions make sealing hazardous.[39]

The court of appeals recognized the "practical necessity" of adopting some formula for determining the seals' age but held that the Secretary's formula violated the Act.[40] The court simply concluded:

> the Government has decided to allow *half* the sealskins imported to be from underage seals. This formula is so far from meeting the statutory standard that it must be rejected.[41]

Thus the court treated the ten-week harvest as if it were a one-day harvest occurring on August 1. But because the harvest lasts ten weeks, almost all the seals are more than eight months old when taken; even in the court's humanistic statistical terms, the youngest are within a few days of it.

In attempting to justify its predetermined result, the court strained its own logic. On the one hand, it held that the age provision applies to "individual animals,

[38] Initial Decision, App. 21a.

[39] *Ibid.*; Hearing Tr. 109, 158-59, 206-07, Admin. Rec.

[40] Slip Opinion at 18, App. 84a.

[41] *Id.* at 19, App. 85a (emphasis in original).

not groups or populations."[42] On the other, it suggested that age determination should be made by group statistics:

> While we do not decide what date the Government could lawfully establish, it appears on the basis of the data before us that December 18, when about 95% of the seals have been born, would be a logical choice; thus all seals could be deemed to be at least eight months old if they are killed on or after August 18 each year.[43]

However, the basic vice below was not the court's misuse of statistics but its rejection of a determination committed by the Act to wildlife management expertise. In using a mean birth date, the Secretary did not purport to determine the exact age, in human terms, of any individual seal; that is an impossibility. Rather he established a definitional birth date that is reasonable, workable, and in accordance with accepted wildlife management principles. To measure the age of a Cape fur seal from the mean birth date of December 1 is like measuring the age of a thoroughbred racehorse from January 1 in the year it is foaled. Just as the foal becomes one year old on the following January 1, so the Cape fur seal pup becomes eight months old on the following August 1.

The court of appeals brushed aside the statutory directive to apply wildlife management principles; it ignored uncontroverted record facts; it substituted its own views for the Secretary's expertise. In so doing, it

[42] *Id.* at 18, App. 84a.

[43] *Id.* at 19n.52, App. 85a.

violated established standards for judicial review[44] and undermined the Act. The decision should be reviewed.

B. The Nursing Provision.

Subsections 102(b)(2) and (c)(2) of the MMPA prohibit importing sealskins from animals that were nursing at the time of taking. The Act and legislative history are silent on the meaning of nursing. The term is subject to a variety of interpretations: at the least it could mean "in the act of nursing" and at the most it could mean "still capable of nursing." In respect to Cape fur seals it could have other meanings in between.

The congressional purpose for the nursing provision is not explicit. The court of appeals assumed that it was "based entirely on emotional concerns,"[45] but the legislative history lends no support to this assumption. The statute links the nursing provision with the age provision; this circumstance strongly indicates that both were used as criteria for determining animal maturity and independence. The court of appeals acknowledged this purpose in recognizing that nursing is "a measure of infancy, of vulnerability and helplessness."[46] But the court then rejected the Secretary's evaluation of these factors.

To assist him in interpreting the nursing provision in a manner both workable and consonant with Congress' intent, the NMFS Director sought guidance from the House Subcommittee on Fisheries and Wildlife Conser-

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[44] *See, e.g.*, Mourning v. Family Publications Service, Inc., 411 U.S. 356, 371-72 (1973); Udall v. Tallman, 380 U.S. 1, 16 (1965).

[45] Slip Opinion at 20, App. 86a.

[46] *Ibid.*

vation, which drafted the MMPA and oversees its administration. In its 1974 oversight hearings, the subcommittee said that Congress' intent was to protect seals that are nursing for survival, not merely for convenience.[47]

Acting on his expert knowledge and the advice he received from Congress, the Director proposed and, after notice and public comment, promulgated a regulation determining that the statutory term "nursing" means nursing that is "obligatory for the physical health and survival of the nursing animal."[48] The Director so applied the term in waiving the moratorium.

The court of appeals rejected the Director's regulation on nursing as narrowing the statutory language;[49] the court disregarded the agency's informed judgment that seals are mature by eight months of age, whether or not some may thereafter occasionally nurse for convenience.[50]

In overriding the administrative decision, the court of appeals ignored this Court's command to defer to the expertise of the agency "charged with the responsibility

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[47] *Hearings on Oversight of the Marine Mammal Protection Act of 1972, Subcomm. on Fisheries and Wildlife Conservation, House Comm. on Merchant Marine and Fisheries*, ser.93-24, 93d Cong., 2d Sess. 361 (1974).

[48] 40 Fed. Reg. 17845 (1975).

[49] Slip Opinion at 22, App. 88a.

[50] Cape fur seals lose their physical and psychological dependence on nursing between their third and sixth month, when they become capable of obtaining their own food. So long as the mother seal is available, however, the young seal may continue to nurse out of convenience. Initial Decision, App. 20a. Even "convenience" nursing ceases in October, when the seals leave the rookeries. Slip Opinion at 21, App. 87a.

of setting [the statute's] machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new."[51] The lower court's decision should be reviewed.[52]

CONCLUSION

In conflict with this Court's constitutional holdings on standing, the court of appeals has fashioned its own constitutional law to confer standing on Respondent organizations. It has done so in order to reach and reject expert agency findings, conclusions and regulations made under the new Marine Mammal Protection Act. The court's treatment of the administrative record and determinations of key statutory provisions is an abuse of judicial review in disregard of the agency's expertise, the uncontroverted facts, and the fundaments of the MMPA.

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[51] Power Reactor Dev. Co. v. Int'l Union of Elec. Workers, 367 U.S. 396, 408 (1961), quoting Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

[52] The court of appeals also rejected the Secretary's § 101(a)(3)(A) certification (41 Fed. Reg. at 7539) that South Africa's harvesting program is consistent with the policies and provisions of the MMPA. Slip Opinion at 24, App. 90a. Since that result was based solely on the court's holdings on age and nursing (*ibid.*), it requires no separate consideration.

This Court should grant the writ of certiorari to review the judgment of the court of appeals.

Respectfully submitted,

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October 25, 1977

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION

In the Matter of:

The Fouke Company

Application to waive the Moratorium on the Importation on Cape Fur Seal Skins

Docket Number: MMPAH #1, 1975

* * *

INITIAL DECISION

STATEMENT OF THE CASE

On March 18, 1975, The Fouke Co., herein the Applicant, requested that the Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration of the Department of Commerce, herein the Director, Service, Administration and Department, respectively, waive the moratorium on importation pursuant to the Marine Mammal Protection Act of 1972, herein the Act, 16 U.S.C. 1361 et seq., to the extent that 70,000 cape fur seal skins (*Arctocephalus pusillus pusillus*) from the 1975 South African harvest may be imported. Pursuant to his authority, the Deputy Director on June 30, 1975, issued a Proposed Waiver of Moratorium on Importations, Proposed Regulations to Govern Such Importations, and Notice of Hearing, herein the

the Proposed Waiver. The Notice was thereafter published in the Federal Register on July 7, 1975, 40 Fed. Reg. 28469. The Proposed Waiver was amended by a Change in Schedule for Hearing on Marine Mammal Application issued August 8, 1975, and published in the Federal Register August 12, 1975, 40 Fed. Reg. 33849.

A draft Environmental Impact Statement was prepared by the Service and was made available for public review. Pursuant to paragraph C. subparagraph (1) of the Proposed Waiver the following parties gave timely notice of intent to participate: The Committee for Humane Legislation, Inc., Friends of the Animals, Inc., Society for Animal Rights, Inc., Monitor, Inc. (including Endangered Species Productions, Chesapeake Chapter American Littoral Society, American Littoral Society, Animal Protection Institute, Defenders of Wildlife, Environmental Policy Center, Friends of the Earth, Fund for Animals, International Fund for Animal Welfare, International Fund for Animal Welfare – USA, National Parks and Conservation Association, Sierra Club, Society for Animal Protection Legislation, Wild Canid Survival & Research Center, Wilderness Society, Committee for the preservation of Tule Elk, The Humane Society of the U.S., and the National Audubon Society), The Humane Society of the U.S.[1], The Marine Mammal Commission, herein the Commission, Diggs *et al* (including Charles C. Diggs, Yvonne B. Burke, Shirely Chisholm, Cardiss R. Collins, John J. Conyers, Jr., Ronald V. Dellums, Walter E. Fauntroy, Harold E. Ford, Augustus Hawkins, Ralph Metcalfe, Parren J. Mitchell, Charles B. Rangel, Louis Stokes, Andrew Young, The American Committee of

[1]The Humane Society of the U.S. withdrew as a participant in the hearing after hearing had opened.

Africa, the Washington Office of Africa, The Episcopal Churchmen for South Africa, Theo-Ben Gurirab, the Representative Plenipatentiary of South West Africa Peoples Organization to the United Nations and to the Americas, and the Center for National Security Studies)[2], Michael I. Davis[3], David I. Kasume[3], Elizabeth S. Landis[3], and the Republic of South Africa[4]. Proposed testimony was submitted on a timely basis by the following participants: the Service, Republic of South Africa, David I. Kasume, Elizabeth S. Landis, Michael I. Davis, Society for Animal Rights, Inc., the Applicant, Monitor, Inc., the Committee for Humane Legislation, Inc. and Friends of Animals, Incorporated. Additionally, documents[5] to the Draft Environmental Impact Statement were submitted by the following: Department of State, Department of the Interior, Environmental Protection Agency, Friends of the Animals, Inc., and the Columbia Zoological Park. On August 19, 1975, the Commission moved to modify the Order amending the Proposed Waiver to postpone the date of the pre-hearing conference. On August 25, 1975, the undersigned issued a Preliminary Determination of the Issues of Fact. On August

[2]Diggs *et al* participated in the proceedings only to the extent of offering the Motion to Amend, discussed below, offering testimony on the Motion, and arguing the merits of the motion.

[3]Michael J. Davis, David J. Kasume, and Elizabeth S. Landis, pursuant to the Proposed Waiver, submitted testimony going to the merits of Motion noted above in footnote 2, but otherwise did not participate in the proceedings.

[4]The Republic of South Africa, pursuant to the Proposed Waiver, submitted testimony, but withdrew from the proceedings prior to the pre-hearing conference.

[5]General comments to the Proposed Waiver were also received at various stages of the proceedings which were rejected as exhibits.

26, 1975, the undersigned issued an Order denying the Commission's Motion noted above. On September 6, 1975, Diggs *et al* filed a Motion to Amend Section 1, 3(a), and 4(b) of the Proposed Regulation and to Exclude From the Hearings Thereon Certain Testimony. The Applicant and the Service filed opposition to such Motion. Monitor, Inc. and the Commission filed responses in support to such Motion. The Pre-Hearing Conference was held as scheduled on September 8, 1975. Thereafter, on September 16, 1975, the Final Agenda was issued. The hearing was held as scheduled on September 18, 19, 20, 22, 23, and 24, 1975. All the parties appeared and were given an opportunity to offer evidence and make arguments. After the close of the hearing the Applicant, the Service, the Commission, Monitor, Inc., and Diggs *et al* filed briefs. Additionally, the Commission filed a Motion to connect the Record which is granted in part, see Appendix A.

Upon the entire record I make the following findings:

Statutory Authority

The Marine Mammal Protection Act in its statement of findings and policy recognized "the danger of extinction or depletion [of certain species or population stocks] as a result of man's activities;" and further found that, "such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect the rookeries, mating grounds, and areas of similar significance for each species of marine mammal

from the adverse effect of man's actions." While recognzing that there was "inadequate knowledge of the ecology and population dynamics of such marine mammals" stated as policy that there should be "negotiations . . . to encourage the development of international arrangements for research and conservation of, all marine mammals." The Act, however, recognized the commercial importance of the marine mammals, their products, and interrelation within the marine ecosystem to other commercially important animal and animal products. The policy declaration further stated, "marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat."

Thus, we are dealing not with the simple situation of conservation for conservations sake. While recognizing the social value of a balanced ecosystem the statute equally recognized the economic and commercial value of marine mammals and marine mammal products. It is in the balancing of these interests toward as wise and prudent use of wildlife that this case must be decided.

The Act to effect these policies prescribed a moratorium on the taking and importation of marine mammals and marine mammal products. However, Section 101(a)(3)(A) provided for a waiver of the moratorium under the following circumstances:

The Secretary of the Department on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this Act to waive the requirements of this section so as to allow taking, or importing of any marine mammal, any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 102, 103, 104, and 111 of this title permitting and governing such taking and importing, in accordance with such determinations: Provided, however, That the Secretary, in making such determinations, must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this Act: Provided, further, however, That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this Act. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.[6]

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[6]The statute makes no distinctions as to the social value of the product as an issue to be given weight. Thus, it is not material whether the product is a necessity or a luxury. Implicit in the oppositions of some Protestants, and explicit in that of witness Herrington and Protestant Friends of the Animals, was the objec-

[footnote continued]

Finally, under Section 102(b) further restrictions even on this limited scope of waiver of the moratorium were established as follows:

> (b) Except pursuant to a permit for scientific research issued under section 104(c) of this title, it is unlawful to import into the United States any marine mammal if such mammal was –
>
> (1) pregnant at the time of taking;
>
> (2) nursing at the time of taking, or less than eight months old, whichever occurs later;
>
> (3) taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock or which has been listed as endangered under the Endangered Species Conservation Act of 1969; or
>
> (4) taken in a manner deemed inhumane by the Secretary.

The sentiment of Congress on waivers was expressed in the Joint Explanatory Statement of the Committee of the Congress (Congressional Record-House, October 2, 1972, page 33226):

> As a prerequisite to the issuance of regulations and the subsequent issuance of permits under the Act, the House bill required the Secretary to make a finding that the taking of marine mammals pursuant to such regulations would not be to the dis-

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tion to the luxurious use of the cape fur seal skins. Such comparative value of an animal life versus a luxury appears to provide much of the emotional impact. Certainly if the indigenous population or the Republic of South Africa were in need of a high grade animal protein which only the South African cape fur seal would supply, this case could be viewed with more objectivity.

advantage of the species or stocks involved and would be consistent with the purposes and policies of this Act. The conferees accepted the House language. While clearly it would not be to the advantage of an individual animal to be removed from a population, the evidence was clear that in some circumstances it would be to the advantage of a species or stock to allow taking as part of a scientific management program. An obvious example would be the taking of animals from an overpopulated group, or removal of animals surplus to breeding needs.

The Issues

The issues presented by the case were as follows:

1. Motion to amend Sections 1, 3(a), and 4(b) of the Proposed Regulations and to Exclude From the Hearings Thereon Certain Testimony.

2. The estimated existing levels of the species and population stocks of the Cape fur seal.

3. The optimum sustainable population of the Cape fur seal.

4. The anticipated effect of the proposed waiver on the optimum sustainable population of the Cape fur seal.

5. A harvesting date to ensure seals are not pregnant, nursing, or less than 8 months of age at time of taking, or biological date and physical characteristics acceptable in lieu of said date.

6. The adequacy of the South African's government's management program to insure the harvesting is in accord with sound principles of resource protection and conservation as provided for by the purposes and policies of the Marine Mammal Protection Act.

7. The humaneness of the 1975 harvest including the standard for humaneness and supervision to insure humaneness.

8. The impact of the proposed waiver on the marine ecosystem and related environmental considerations, such as distribution, abundance, feeding habits, and migratory movements of the ecosystem.

9. Whether there is a conflict of interest in consideration of the waiver of the moratorium, and in any waiver which may be granted, because of certain specifications in existing contracts between the Administration and the Applicant.

Findings of Fact

1. Motion to Amend Sections 1, 3(a), and 4(b) of the Proposed Regulations and to Exclude From the Hearings Thereon Certain Testimony.

Protestants Diggs *et al* who were joined in concept by Protestants Landis, Kasume, and Davis, moved for the following amendments:

1. To exclude as inadmissible, by reason of U.S. international legal obligations, testimony by the South African Government or any of its agents regarding "Cape fur seals" located or harvested in Namibia;

2. To prohibit any dealings by the U.S. Department of Commerce pursuant to the Marine Mammal Protection Act with the South African Government in regard to or in Namibia to inspect the humaneness of the seal harvests, or for any other reasons; and

3. To amend Sections 1, 3(a) and 4(b) of the proposed regulations to limit the proposed waiver of the moratorium to "Cape fur seals" harvested in South Africa, and, thereby, specifically, to exclude from

the proposed waiver, or any consideration thereof, "Cape fur seals" harvested in Namibia (sometimes erroneously referred to as "South West Africa").

Also joining in support of the Motion were the Commission, Monitor, Inc., the Committee for Humane Legislation, Inc., and the Friends of Animals, Inc. The Applicant and the Service opposed the motion.

Namibia is referred to in the motion as the former territory of German Southwest Africa. After World War I by the Treaty of Versailles Germany lost its colony which became under aegis of the League of Nations a mandate of the then Union of South Africa. Then subsequent to the demise of the League of Nations, the World War II, and the organization of the United Nations, dominion over the territory was maintained by the emergent Republic of South Africa. The situation resulted in a dispute and an advisory opinion of the International Court of Justice. Advisory Opinion on Status of South-West Africa (1950) I.C.J. 128, 133-134, 136-137. In the opinion the existing status was concluded to be invalid.

The evidential relationship of the opinion to the matters in issue is apparent when it is considered that some rookeries and sealing sites are located in the territory. Additionally seal skins have been taken at those locations in the past and can be expected to be taken at these locations in the future.

At the hearing it was argued that international legal obligations required the Department to restrict the waiver of the moratorium to seal skins taken in South Africa only. Further, it was submitted that testimony should be limited to exclude testimony related to Namibia, that the Department be excluded from dealing with South Africa as to Namibia, and that the waiver be amended in these to the same effect.

The motion was denied. It was concluded that the Administrative Procedures Act was specific in excluding from the Administrative Law Judge's authority in Section 553(a), questions "to the extent that there is involved – (1) a military or foreign affairs function of the United States. Further, it was concluded that even the "treaty" basis of the motion was not factually correct since it involved not the treaty, itself, but an advisory opinion arising under the authority of the treaty.

In arguments in briefs the issues presented were raised again. The ruling made at the hearing is hereby reaffirmed. The exclusion from Section 553(a) is as broad as the basic grant of authority. Foreign affairs functions are initially a matter for executive decision and executive action. A legal test of such decision on action must be made in a court of competent jurisdiction, which this proceeding is not. Absent such authority in an appropriate court, the question becomes a political question which must be addressed to the executive authority or to the Congress.

2. The Estimated Existing Levels of the Species and Population Stocks of the Cape Fur Seal.

Determining the population level of animals in the wild is difficult at best. This becomes even more difficult in dealing with acquatic animals such as the South African fur seals. In the Cape Fur Seal Arctocephalus Pusillus, 4. Estimates of Population Size[7], R.W. Rand reported as follows:

> Seals live on land and in the water, but it is difficult to detect them in the ruffled opague sea of the

[7] R. W. Rand, The Cape Fur Seal *Arctocephalus Pusillus*, 4. Estimates of Population Size (Division of Sea Fisheries Investigational Report No. 89, 1972).

South African coast and their erratic underwater movements confound precise counting. On land, however, the seals are sedentary and show a pattern of behaviour that makes it relatively easy to identify individuals of certain age-classes.

Investigators have used various methods to calculate the numbers of seals in different parts of the world. Some researchers have simply counted by eye (the counting of bull seals from catwalks is still done with success on the Pribilof Islands), but others have made more accurate tallies from aerial photographs. Such aerial surveys have been conducted in Argentine (Carrara 1952), off the Pribilof Islands (Kenyon and Scheffer 1954) and in more circumscribed areas elsewhere (cf. Kenyon and Rice (1961) and Mathisen and Lopp (1963) for the Steller Sea-lion of the eastern Bering Sea). In many cases it was still necessary to formulate the degree of absenteeism of one or other class by considering such signs as discarded placentas, "territory scars", newborn pups and sealing catch figures. Kenyon and Scheffer (1954) discuss other problems of estimating total numbers when drawing up life tables and making complete population counts.[8]

This study supplemented reports in 1959 (Rand), which covered all rookeries except 2 and in 1967, which was a partial survey. These 2 reports relied on photographed surveys. The estimates followed by the 1972 Rand computations, by the Best study (1973) and the Shaughnessy computations in August 1975.[9]

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[8]Additionally population level can be determined by tagging of animals.

[9]Best and Shaughnessy both relied on the 1971 aerial survey. The difference in estimates Best (1,000,000-1,250,000) and Shaughnessy and Best (850,000) are results of different methods and not a basic dispute between the two experts.

These determinations all required substantial reliance on mathematical computations based upon facts and assumptions. The basic facts are not in dispute as no evidence was offered which would place in question these observations.

Historically there appear to have been no estimates of population size. What knowledge of the population was available resulted from kill count and extensions and contractions of rookeries, as to size and density of rookeries and existence of rookeries at locations in the general range of the Cape fur seals. There appears to be no doubt that since the 19th century there has been substantial increase in population. This appears largely to have been the result of the successful wildlife management program of the Republic of South Africa since 1893.

While there have been substantial study of the Cape fur seals this is not to indicate that everything necessary is now known. In his work in 1972 Rand states:

> Cows are a convenient index to pup numbers and if parameters such as mortality and migration are known, we can accurately interpret the structure of the pup population. There are many aspects stemming from the years of sealing management, which are already affecting the growth of the herds in subtle ways. Thus the century-old protection enjoyed by breeding cows has led to appreciable numbers of senile or unproductive animals at the rookeries. The significance of out-of-season births, widespread breaks in the care of pups (starvelings) and other instances of mortality during the first year, are some further features of the fur-seal biology that should be investigated in the near future.

In preparing his studies Shaughnessy[10] and later Shaughnessy and Best[11] rely on information available on the northern fur seal, *Callorhinus ursinu* in making assumptions. As they say in the Simple Population Model:

> Because many of the aspects of fur seal behaviour and biology relevant to this model are unknown for *A. p. pusillus,* frequent reference has had to be made to the northern fur seal, *Callorhinus ursinus,* for which a larger body of pertinent data has been published.

Within the order of pinnipeds is found the superfamily of fur seals (otaniidae). The Northern fur seal belongs to a separate genus *callorhinus.* Included with the South African fur seal in the genus *artocephalus* are several other species. This includes the South American, Galapagos, Guadalupe, Australian, Juan Fernandez, and Kerguelen, fur seals.[12] Shaughnessy includes in the same species the South African and the Australian or Tasmanian fur seal. Since Shaughnessy and Best relied on data on the Northern fur seal rather than on the comparable information on another subspecies of the same species (according to Shaughnessy), or on the same genus (southern fur seals) it is assumed that comparable information is also unavailable as to the related sub-species or genus. No evidence or argument was made on the scientific reliability of the information used from a separate genus.[13] Since it appears to have been acceptable to all

[10]P. D. Shaghnessy, Submitted Testimony.

[11]Peter D. Shaughnessy and Peter B. Best, A Simple Population Model for the South African Fur Seal, Arctocephalus pusillus, pusillus (Sea Fisheries Branch, 1975).

[12]Grzimek, Animal Life Encyclopedia, (1975).

[13]Genus is defined as:

A category as classification ranking between the family and the species; a group of structually or phylogenetically related

[footnote continued]

scientists who appeared it is concluded to be valid but does point up an area where more information would indeed be desirable.

Attempts to prove by computer the Shaughnessy and Best population model of 1975 were unsuccessful. However this does not establish that the conclusions they drew as to population estimates were necessarily erroneous. It does point out another area where additional research is indicated.

Notwithstanding the inherent problems of establishing the population size in animals in the wild and the present limitations on scientific data on harem size, pupping rate, life expectance[14], pup mortality, density dependent factors, age of first pregnancy, and life expectancy, no serious attack was made on the final conclusions of Shaughnessy and Best in these population estimates. For the purpose of this case and recognizing the deficiencies

species, or consisting of an isolated species exhibiting unusual differentiation (monotypic genus). The distinctions between genera are sometimes empirical or arbitrary, and are liable to modification as knowledge advances.

Species is defined as:

A category of classification lower than genus or subgenus and above sub-species or variety; a group of animals or plants which possess in common one or more characters distinguishing them from other similar groups, and do and may interbreed and reproduce their characters in their offspring, exhibiting between each other only minor differences bridged over by intermediate forms (see Subspecies) and differences ascribable to age, sex, polymorphism, individual peculiarity or accident, or to selective breeding by man; a distinct kind or sort of animal or plant. Websters New International Dictionary, 1957.

[14]The only evidence of life expectancy of the Cape fur seal is 12 years. Straussen, the Fur Seal of Southern Africa (1971). This was not supported by any expert on the Cape fur seal. In the Northern fur seal 30 to 35% do not survive over a year and 90 to 95% do not survive over 5 years.

noted it is concluded that the present population level is 850,000. The evidence is insufficient to conclude what margin of error is measurable on such a population estimate.

3. The Optimum Sustainable Population of the Cape Fur Seal.

The Act established the standard of optimum sustainable population. It was defined as follows:

> The term "Optimum sustainable population" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population of the species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of which they form a consitutent element.

This does not represent the statutory application of scientific terminology. The standard was not used by animal scientists prior of the statute; in fact all expert witnesses were consistent in their distrust of the term as a scientific concept. Indeed the only attempt to scientifically verify the term in the Bertrand paper[15] commissioned by the Commission has not as yet been accepted by that body.

The comparable terminology generally used by scientists appears to be maximum sustainable yield. Testimony indicates and it is concluded that while the terms may not be precisely equal, both optimum sustainable population

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[15]Gerard A. Bertrand, Optimum Sustainable Population and the Management of Marine Mammals (Marine Mammal Commission, 1975).

and maximum sustainable yield are within the same general range.[16]

It is concluded that the present population of 850,000 Cape fur seals is within the range of the optimum sustainable population of the species on population stock.

4. The Anticipated Effect of the Proposed Waiver on the Optimum Sustainable Population of the Cape Fur Seal.

Shaughnessy has estimated the total population at about 850,000 and the annual pup population of 211,-300. The estimate of a conservative pup sealing rate which he made was 33% with a maximum sustainable yield of 70,000.

Since it is concluded that maximum sustainable yield and optimum sustainable population both exist at the same general population level, sealing at the rate specified should not impair the integrity of the optimum sustainable population. Assuming the reliability of Shaughnessy's estimates in his population model the conclusion appears valid.

However, as indicated the population model both because of its complexity and because of the lack of significant data can not be confirmed. The significance of this lack of confirmation must be given too great an emphasis. It is a valuable tool to be used in reaching conclusions on courses of action but confesses to some imprecision in application to the Pribilof harvests where much more data is available.

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[16]Shaughnessy would compute optimum sustainable population as maximum sustainable yield plus ten percent. Although regarded as a simplistic approach by some experts it is accepted by the United States and South African agencies and will be for the purposes of this decision.

Witness Ossiander in discussing the inability to prove the model testified as follows in answer to a question on harvest rate which would be consistent with maintaining the integrity of the population level:

> THE WITNESS: I have not tried to formulate an estimate of this. If I were to give some judgment, I would consider, since they have been harvesting population at approximately this level, and they have made statements that they feel the population is increasing at this time, I would consider that is probably a safe harvest level.

Further he testified that review of the five and ten year censuses of birth of pups should indicate the safety of the harvest levels.

The harvest levels of pups over the last 15 years were as follows:

1959	34599
1960	41933
1961	48052
1962	44174
1963	50640
1964	51360
1965	60057
1966	45433
1967	64057
1968	68807
1969	74485
1970	81207
1971	76807
1972	78029
1973	80674
1974	66816

In the fifteen year span the sealing of yearling seals has increased by more than doubling, in the last 10 years it has increased by about 50 percent, and in the last 5 years it has increased by less than 10 percent.

There appears no doubt that there has been a seal population explosion since 1940 as amply supported by Rand, Shaughnessy and Best. The sealing rate from 1940 to 1950 varied from a low of 8737 to a high of 27289 with a median of 12566. It is noted that it is only after 1960 that yield exceeds 50,000 skins.

Applying the conservative approach of Dr. Ossiander to the harvest rate the 10 year median would be 71746. The same 5 year mediam rate 78029. The proposed waiver under all the circumstances appears to be a prudent and conservative approach, at least until the additional population censuses confirms the stability of the population levels in the range of Optimum Sustainable Population – Maximum Sustainable Yield as expressed above.

It is accordingly concluded that on the basis of all evidence offered, sealing of yearling seals at the rate of 70,000 a year can not at this time be anticipated to impair the optimum sustainable population level.

5. A Harvesting Date to Ensure Seals are not Pregnant, Nursing, or Less than 8 Months of age at Time of Taking, or Biological Date and Physical Characteristics Acceptable in Lieu of Said Date.

There is no issue on the question of pregnancy. All the evidence established that only yearling seals are taken. These yearling seals clearly have not reached sexual maturity. Further it is also clear that the mating season begins well after the end of the sealing operations.

"Nursing" is a statutory term. There is no indication from the Act or the legislative history what interpretation

Congress intended to apply to this apparently simply uncomplicated term. The thrust of the Service's Motion to Limit the Scope of Consideration of the Nursing Issue and to Strike Certain Testimony was that the "nursing" as used in the Act was limited to "nursing" which is obligatory for the physical health and survival of the nursing animal." The motion was granted.[17]

There is no doubt that a significant number of yearlings killed had milk in their stomachs. Under the interpretation of the Service this is only material if the yearling was engaging in obligatory nursing. All evidence introduced supports the conclusion that pups begin catching and eating solid food as early as one month.[18] Further all testimony indicates that obligatory nursing has ceased by from three to six months. Finally the testimony establishes that despite the termination of obligatory nursing convenience nursing continues as long as the cow allows the yearling to continue. In cases where the cow does not produce a pup the following year convenience nursing has been known to continue well into the second year.

It is accordingly concluded that animals taken after July would not be nursing within the meaning of nursing applied under the Act.

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[17]The statute contemplated the issuance of interpretative rules by the Director. See Section 112. The policy on nursing as including only obligatory nursing was proposed under the rule making procedure on January 28, 1975. 40 CFR 4660, (January 31, 1975). After consideration of the proposed rule and comments received the rule was promulgated in the form referred to on April 18, 1975 40 CFR 17845 (April 23, 1975). It was concluded in ruling on the motion that the interpretative ruling was controlling for the purposes of these proceedings.

[18]The South African fur seal is a predator of fish and crustaceans.

The Act specifies that no marine mammal may be killed which is "less than eight months old." Determination of the birth date of animals in the wild cannot be precisely made. In the case of the Cape Fur Seals pupping occurs in late spring and early summer (November and December). The following breeding seasons begins in October and November or approximately a year later. Because of weather restrictions sealing becomes hazardous along the South African coast in late September and October, or approximately 9 or 10 months after the pupping season.

Research by Rand (1955) and Shaughnessy and Best (1975) established that normal pups are generally born in November and December with few being born after December. Shaughnessy testified that 50% of the pups were born by December 1; 70%, by December 4, and 95% by December 18. The figures and the scientific reliability of the observations were not contested.[19] Sealing, then, occurring on August 1 should result in a random sample where the median age was 8 months. An August 5 sealing date should result in 70% aged 8 months or more, and August 18, 95% aged 8 months or more.

Sealing in 1975 began on August 4 and terminated at an unspecified later date. No evidence was offered to show the daily kill count. This would be necessary in order to definitely establish the probable age of seals killed. Recognizing the inherent inaccuracies in age dat-

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[19]However evidence indicates the determinations were made on the basis of a limited number of annual observations at a limited number of sites. Evidence further establishes there are no preceptibile means of determining difference in age of seals between 6 and 10 months because of variables. Even the one critical characteristic the first molt (from black to dun gray) varies from 3 to 6 months of age.

ing animals in the wild some system based on probability is appropriate. The mean age would be the average of all the ages of the yearling and thus suffers from the same infirmity of age dating. The median, however, as reported by Rand would establish the 8 months age date as August 1. However acceptance of the median age as the absolute could lead to the contradictory interpretation of the median seal taken would be of the median age of 8 months which would be inconsistent with the Act. It would require only that half the yearling seals be killed before August 1 and half be killed after that date. Acceptance of the median formula requires that it be coupled to an established first harvest date which would not be inconsistent with the policy of the Act. Acceptance of a date coupled median is concluded to be sufficient. The concept presented by Protestants of an absolute proscription based on a requirement that *all* be over 8 months of age appears restrictive beyond the scope of reasonableness. Such would place extreme pressures on sealing operations in South Africa and could well, in the long run, be counter-productive.

Accordingly it is concluded that sealing beginning August 1 would satisfy the Acts requirement that seals taken be at least 8 months of age. Since sealing continues into October as a normal course the incidence of the killing of seals under the age of 8 months should not be substantial enough to warrant denial of the waiver.[20]

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[20]It is recommended that information on daily kill count be obtained so that a projection of probable age can be established. With the development of additional date on the births referred to above a sufficient degree of control and if necessary reexamination of this issue could be made. For the purpose of this decision acceptance of a first harvest date of August 1 is appropriate. The seals killed that date should produce a random sample of 50% over

[footnote continued]

6. The Adequacy of the South African's Government's Management Program to Insure the Harvesting is in Accord With Sound Principles of Resource Protection and Conservation as Provided for by the Purposes and Policies of the Marine Mammal Protection Act.

South Africa has maintained a management program for the South African Cape fur seals since 1893. The overall success of the program is established by the evidence of a species making a resurgence from a diminished state to one where the range of the fur seal approaches and in some cases exceeds that of its range before the arrival of the European commercial predators.

The act recognized the dual purposes to be served. There is no doubt that Congress could have established absolute limits leaving control of the population to natural predators and traditional subsistence hunters. This, however, was not done. The substantial economic importance of marine mammal products was recognized and the restrictions were imposed with this equally in mind. Consistent with that policy the Republic of South Africa independently established its own program recognizing the dual objection of conservation and utilization in the Sea Birds and Seal Protection Act of 1973.

Under the South African system sealing is by the Sea Fisheries Branch and by concessionaires under contract with the Sea Fisheries Branch. This is the same system

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8 months. As harvesting extends beyond August 5 a 70% over 8 months is reached and beyond August 18 a 95% over 8 months is excceded. A daily kill count would be necessary in order to establish the actual mix in a random sample. For example: if one-third are killed between August 1 and August 5; one-third between August 5 and August 18; and one-third, after August 18, a random sample should produce 70% over the age of 8 months. This would reduce the underage number below an acceptable level.

which was in use in 1974 when the harvest did not meet the United States standards. The negative references made in the 1974 report all related to products of the management programs. There were as follows:

1. The fact that the Sea Fisheries Branch was relying to heavily on the voluntary co-operation of the sealers,
2. that unsatisfactory clubs were being used, and
3. the absence of a strict and continuous inspection service.[21]

Since 1974 the Republic of South Africa endeavored to improve its control of sealing. Additional Sea Fisheries Branch personnel were assigned to monitor the activities of concessionaires. Attempts were made to obtain and manufacture suitable clubs and knives. The inspection program was augmented by the personnel referred to above.

Beyond this the Sea Fisheries Branch has proposed new regulations which are presently under study. These provide as follows:

(i) Members of sealing teams will function in three categories, viz. "drivers", "clubbers" and "stickers", and before any sealing operations are commenced they must be properly instructed in their tasks, the use of the implements they will handle and the importance of humane killing methods.

(ii) "Drivers" must be equipped with long, light sticks of maximum 30mm thickness to enable

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[21]Management Policy and Control Measures with regard to Sealing in South Africa and South West Africa. page 5.

them to herd or drive the seals and to stop the yearlings from escaping into the sea. They may only hit the animals in self-defense.

(iii) "Clubbers" must be equipped with clubs, manufactured of wood or glass fibre, with a minimum mass of 1.25kg and maximum of 1.70kg, minimum length 1.40m and maximum 1.70m and minimum circumference at thick end of 50mm tapering to 30mm at the thin end.

(iv) "Stickers" must be equipped with sharp double-edged knives with a blade at least 12cm long and 3cm wide.

(v) All the sealers must co-operate to stop the yearlings from escaping into the sea while allowing as many adults as possible to escape. The surrounded seals must then be allowed to calm and settle down, either on the spot or, where the nature of the terrain is suitable, on a flat, open space.

(vi) A limited number of yearlings must then be separated from the encircled seals and individually clubbed by means of a blow with the prescribed club aimed at the top of the head between the ears.

(vii) As soon as a limited number of yearlings have been clubbed, the "stickers" must pierce the heart and sever the main arteries round the heart of each of the clubbed pups.

(viii) The Director of Sea Fisheries, his representatives and any Sea Fisheries Inspector will have access to the concession area at all times for the purpose of inspecting equipment and methods used.

(ix) Failure to comply with these prescriptions will constitute an offense under the Sea Birds and Seals Protection Act, 1973, and will be punishable by a maximum fine of R100 or imprisonment for a maximum period of 45 days or both. The Minister of Economic Affairs may also order a prohibition of sealing operations at any place within a concession area where the nature of the terrain renders it difficult or impossible to permit sealing in an orderly and systematic manner as prescribed.

While not yet in effect and not therefore evidence of the existing program, the fact of their present study is indicative of a continued interest in improvement.

The present system operates primarily on the base of concessionaires. Concessionaires harvest at 15 sites while the government harvests at only 3. Concessions have been awarded on the basis of bids. There is, however, no indication that prospective concessionaires have been disqualified for failure to comply with humaneness standards.

In cases of concessions the concessionaire has the responsibility for selecting and training sealing crews. The government only establishes the standards (equipment, humanity, etc.) and maintains the on-site inspection service in such cases. Where the government engages in sealing it selects and trains the crew and also maintains the on-site inspections. The failure of the government to supervise selection and training of concessionaires sealers would at first appear prejudicial to their management program. However, testimony of witnesses Drs. McDonald and Wass would indicate that in practice the concessionaires were at least as effective in this area as the government.

The Sea Fisheries Branch has permitted qualified observers to witness seal kills. This could be an effective monitor on the humaneness of the operations.

It is concluded on the basis of the above that the program of the Republic of South Africa is consistent with the standards for management under the Act.[22] This is not to suggest that there is not room for improvement. The proposed rules would be desirable. It would also be desirable to have further training of crews, more control of crews, better policing of concessionaires, and the augmented inspection force (including veterinary technicians or others under the supervision of veterinaries, who would be trained in humane slaughter). The present system meets the standard of the Act, and recognizing the sovereignty of another nation, imposition of such suggestions must be left to the sound judgment of the Republic of South Africa. There is no doubt using their present system and resources of personnel all the recommendations of Drs. McDonald and Wass, as noted above, could be accomplished even without meeting specific suggestions in detail. It is within the South African authority to control the manner and means, with the standard of re-

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[22]The evidence of witness Whiting is accepted as the truth of what he observed however it is rejected as to his characterizations and conclusions. It is disquieting evidence of what can happen in the absence of trained inspectors to control kills. However, Whiting saw and reported a kill operated without proper procedures and without sufficient control. It is concluded he was too far away to see individual blows with sufficient clarity to determine whether the seal was unconscious after the first blow. Under the circumstances his conclusions and opinions on the humaneness of that kill cannot be accepted. It is sufficient, however, to bolster Drs. McDonald and Wass's recommendation for bolstering of the inspection service including the use of veterinary technicians or others sufficiently trained in humane slaughter. Further it is noted that products of that harvest were not for market to Applicant.

view only being whether the program is in accord with the sound principles of resource protection as provided for by the purposes and policies of the Act.

7. The Humaneness of the 1975 Harvest Including the Standard for Humaneness and Supervision to Insure Humaneness.

The Act as noted above in Section 102(b)(4) prohibits the importation of marine mammals which were taken in a manner deemed inhumane by the Secretary. Humaneness is the killing of animals for human use has historically been a difficult concept to deal with.[23] Humaneness and killing appear antithetical, however, killing is a necessary aspect of the use of many animal products.

The standards of humaneness specified in the Act are as follows:

> The term "humane" in the context of the taking of a marine mammal means that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.

As was stated in the Conference Report.[24]

> "Humane" in the context of taking marine mammals means the method of taking which involves the least possible amount of pain and suffering which can be inflicted upon the animals involved. It is not a simple concept and involves factors such as minimizing trauma to groups of highly intelligent social animals such as whales and porpoises where the

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[23]Deuteronomy 12:21; Humane Methods of Livestock Slaughter Act of 1958 (7 USC 1901), Sec. 1902.

[24]Congressional Record 34637 (daily edition October 10, 1972).

> taking of any member may be distressing to the group. In many cases, when an animal may not be taken humanely the bill will prevent that animal from being taken at all.

Dr. McDonald's definition of humane killing was:

> . . . the rendering of unconsciousness leading to death with a minimum of excitement on the part of the animal and in the minimum possible time with a minimum perception of pain or psychological disturbance. N.T. 304

This definition does not differ substantially from the testimony of witness Herrington who rejected the concept of humane killing but substituted and accepted her concept of precision in killing. She stated as follows:

> A. To render the animal unconscious prior to actually taking the life.
>
> * * *
>
> A. With a single mechanical blow.
>
> Q. [By Mr. Fensterwald] Would you say the same would be true of seals?
>
> A. Definitely. My definition of precision in killing is to subject the animal to the least possible terror and suffering.[25]

Witness Pressman also defines humane in much the same manner:

> Mr. Eisenbud: As I understand your response to some questions on this matter, you testified that you felt that a quick and painless administration of death was critically important in evaluating humaneness, is that correct.

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[25]Also to much the same effect was the testimony of Witness Whiting in defining humaneness.

[Pressman]: Yes.

Mr. Eisenbud: Under that standard, one accurate blow that administers death or unconsciousness is preferable to two or three, is that correct?

[Pressman]: Yes.

On later in answer to another question:

[Pressman]: Humane slaughter, in my estimation, would be to render the animal dead or totally unconscious in one blow, if blows were what we were using.

Finally Dr. Wass defined his concept in this exchange:

The Court: Now, in your testimony, you have indicated dealing with humane killing as a fairly difficult standard to develop, but it is one that we must in this case develop some standard in relation to. Could you give us your expert opinion as to what you regard as an acceptable standard?

[Dr. Wass]: Well, I want the animal not to be mishandled; I want him carefully handled until the time he is released. When stunning is undertaken, I would like that it be rapid and effective, and I would like it to be without pain, insofar as possible, without, pain, fear, anxiety, any of those things.

I would like the animal not to regain consciousness after it has been stunned.

It is concluded that all of the witnesses with relatively minor variations defined an acceptable manner of killing is much the same way.

Even death itself is a difficult standard to define. The cause of death in the method described may in some cases be the destruction of the critical areas of the brain. In other cases it appears to be the loss of the blood supply

to the brain by the cutting of the heart and the major circulatory system around the heart.

On the basis of all the evidence it is concluded that the "stun and stick" method meets the standard of humaneness defined in the Act.[26]

Operationally the problem areas are the club, the manual swinging of the club, and the unrestrained target animal. The club has been improved over 1974, but did evidence some failure. This is not regarded as evidence of inhumane slaughter. There appears to be no practicable solution to manual swinging of the club.[27] While it is

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[26]The Stun and Stick method appears more humane than any others researched in attempts to arrive at a more humane method.

[27]The club used is copied from that used in the Pribilof Islands. It is described as weighing approximately 3 to 4 pounds, being 55 to 67 inches long and 2 to 3 inches in diameter.

The Final Research Draft on Concept Scrutiny, Prototype Development, and Field Evaluation of Improved Fur Seal Slaughtering Techniques, Battelle (U.S. Department of Commerce, 1972) suggested, "The super club", which would be designed, fabricated, and field evaluated by Aleut clubbers, would be lightweight, rugged, and properly balanced for optimum impact delivery. It is felt that a greater portion of the clubs weight should be concentrated near the impact area with an overall reduction in weight. This design would allow higher club velocity at impact and result in more efficient stunning. The analysis which leads to greater emphasis on velocity than mass is that kinetic energy (KE) is related to velocity (v) and mass (m) by the following equation, $KE = \frac{1}{2} mv^2$. Since kinetic energy increases as the square of the velocity, it is of greater importance than mass in producing energy to be imparted to the seal's skull.

In addition to the suggestions in *Battelle* it is suggested that consideration be given in the differences in the Pribilofs and in South Africa. The seals taken in the former case are older and larger mature males. Even though skulls of all seals are relatively thin older animals would also be more resistant to blows. Since the

[footnote continued]

true swinging of a club for an extended period of time would tend to lead to fatigue and resultant errors of force accuracy. Considering the remote site involved use of devices used in packing houses is not an acceptable substitute. Nor is there apparently any practical solution to the unrestrained target animal. Any restraining device could not at present be reasonably required in the field operations.

It is further concluded that the "stun and stick" method using a manual club is the most effective and practical means now available.

The observations by Ms. Pressman, and Drs. McDonald and Wass are factually consistent. The conclusions which they reach on the Kleinsee Kill (the only one Ms. Pressman observed) conflict. It is concluded that the evaluations by Drs. McDonald and Wass should be given greater weight. They are licensed veterinarians while she is not. They have also done substantially more work in the field of humane killing of animals and specifically seals, than she has.

Accordingly it is concluded that the harvest of seals in South Africa meets the standard of humaneness defined in the Act.[28]

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length of the club is primarily for the protection of the clubber, it appears that a club designed for the specific South African circumstances within the general concepts of *Battelle* would lend further improvement. The shorter better weighted club should reduce fatigue and improve accuracy at no increased danger to the clubber.

[28]It is noted that both Dr. McDonald and Dr. Wass recommend further improvement in inspection. Specifically there was rereference to the use of veterinarians or veterinary technologists to monitor the killing. This would be in addition to the inspector who also concerned with maintaining a count of seals killed. This

[footnote continued]

8. The Impact of the Proposed Waiver on the Marine Ecosystem and Related Environmental considerations, such as Distribution, Abundance, Feeding Habits, and Migratory Movements of the Ecosystem.

As discussed above the impact on the marine ecosystem as far as the seal population is within acceptable limits. The seals as predators on fish at present have an impact on the marine ecosystem and arguably compete with man for fish stocks. No evidence was submitted which would tend to establish that the waiver petitioned for would impair the integrity of the marine ecosystem.

9. Whether There is a Conflict of Interest in Consideration of the Waiver of the Moratorium, and in any Waiver Which may be Granted, Because of Certain Specifications in Existing Contracts Between the Administration and the Applicant.

Monitor, Inc. and the Society for Humane Legislation and Friends to the Animals, Incorporated argued that there existed a conflict of interest in the Service considering the waiver. The evidence of the contracts is concluded to be wholly insufficient to establish a conflict of interest in the Department. In the absence of even a scintilla of evidence of a motive it would be patently unreasonable to conclude that the Director, Service, Administration or the Department would violate the statutory duty under the Act.

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is considered not as establishing lack of humaneness in the present method but as a worthwhile suggestion for the management program. Dr. Wass also recommended a short term waiver of about 2 years. This will be considered below. I find the evidence insufficient to reach a reasoned decision on the Mossel Bay kill observed by Whiting. Finally, it should be noted that the kills meet the standards used in the Pribilof kills and as established by the Humane Livestock Slaughter Act of 1958 only according to the trained veterinarians.

SUMMARY

On the basis of the foregoing and the entire record it is concluded that a waiver should be granted. The Applicant seeks a waiver for 70,000 skins for a period of 10 years. The service would grant a waiver of 70,000 skins subject to annual review by the Director. All Protestants oppose any waiver. The evidence in the case raised some question as to the limits on the waiver. There is limited information on the stability of the optimum population level under a harvest regimen of 70,000 skins. With little being presently known density dependency factors, life expectancy, pup bearing years, fecundity rate, and pup mortality any waiver must allow for variation on the basis of increased knowledge. Although the South African management program is commendable, even the Service witness recommended a limited waiver with a continued monitor program. This relates to both the program and the humaneness of the kill. But in these areas it would be unfair to both the Republic of South Africa and to the Applicant to impose more restrictive standards on South African seal skins which are imported than are presently imposed on the United States Government's own harvest in the Pribilof Islands.

Accordingly it is proposed that the 70,000 skin waiver be granted with the proviso of annual review by the Director. This is as recommended by the service. Additionally it is recommended that the review include the specific areas where the remains some deficiencies in information about long term effects: population levels, optimum sustainable population, the effect of the 70,000 harvest rate on the optimum sustainable population, the 8-month age date, the Republic of South Africa management program, and the humaneness of the slaughter.

RECOMMENDED ORDER

[A. Proposed] Waiver

The Director [proposes to] waives the moratorium on the importation of Cape fur seals (Arctocephalus pusillus pusillus) to the following extent and under the following conditions:

a.[1] *70,000* skins of Cape fur seals taken from each annual harvest of 70,000 skins or such figure as may be substituted therefar after a determination of an appropriate number within the framework of maintaining the integrity of the optimum sustainable population, commencing with the 1975 harvest, by or conducted under the auspices of the Republic of South Africa, may be imported, provided that the Director upon annual review determines that conditions so warrant continuation of the waiver, including the following:

1) information developed subsequent to this waiver confirms population levels at or greater than 850,000 Cape fur seals;

2) information developed subsequent to this waiver confirms the optimum sustainable population at or greater than 850,000 South African fur seals;

3) information developed subsequent to this waiver confirms that the 70,000 harvest rate of Cape fur seals established by the Republic of South Africa, or such harvest rate as may be substituted therefor, does not impair the integrity of the optimum sustainable population of the Cape fur seals;

4) information developed subsequent to this waiver confirms that the mean birth date of

Cape fur seals is December 1 and that sealing does not begin until seals have attained a median age of 8 months;

5) information developed subsequent to this waiver confirms the continued adequacy of the management programs of the Republic of South Africa, or until such time as the adequacy of the management program is confirmed by international compact; and

6) information developed subsequent to this waiver confirms the continuation of acceptable standards of humaneness and supervision to humaneness regulated by the Republic of South Africa.

b. The skins were taken from Cape fur seals which at the time of taking were not:

1) Nursing (nursing means nursing which is obligatory for the physical health and survival of the animal),

2) Pregnant, or

3) Less than eight months old.

c. The taking was in a manner not deemed inhumane by the Director.

[B. Proposed] Regulations

[It is proposed to amend] Part 216 of 50 CFR, Regulations Governing the Taking and Importing of Marine Mammals, *is amended* by adding to S216.32, which was previously reserved, the following:

Section 1 – Purpose. The Director, on _____, waived a moratorium on the importation of skins from Cape fur seals (Arctocephalus pusillus pusillus), harvested

by or conducted under the auspices of the Republic of South Africa subject to certain conditions and limitations. The purpose of these regulations is to establish the criteria, conditions and procedures for importing said skins.

Section 2 – Scope. This section applies to the importation of skins from Cape fur seals which are subject to the waiver by the Director.

Section 3 – Definitions. In addition to the definitions contained in the Act, these regulations, and unless the context otherwise requires, in this section:

a. "Cape fur seals" means fur seals scientifically designated as Arctocephalus pusillus pusillus.

b. *"Eight months old" means eight months old as determined by using a mean birthdate for the Cape fur seal of December 1 for any one pupping season.*

c. "Nursing' means nursing which is obligatory for the physical health and survival of the nursing animal.

Section 4 – Prohibitions. It is unlawful to import skins from Cape fur seals except under the following circumstances:

a. Such importation is pursuant to a permit issued by the Director in accordance with these regulations;

b. Any skins imported are accompanied by a Certification by the Minister of Fisheries, Republic of South Africa, in such form as the Director shall approve, to the effect that such skins are from Cape fur seals which:

(1) [(a)] Were taken in a humane manner as determined by the Director;

(2) [(b)] Were taken from an annual harvest which did not exceed *70,000* Cape fur seals;

(3) [(c)] Were taken under a management program which is designed to maintain a population consistent with the purposes and policies of the Act;

(4) [(d)] Were not pregnant, nursing, or less than eitht months old at the time of taking; [and]

(5) [(e)] The factual basis, in accordance with section 6, for the conclusion that such Cape fur seals were not nursing or less than eight months *old* [of age] at the time of taking; and

(6) Were not taken in violation of the law of the Republic of South Africa.

Section 5 – Importation permits.

a. The Director may issue permits authorizing the importation of Cape fur seals. Any person desiring to obtain such a permit may make application to the Director [. In] *With respect to the 1975 harvest, in* the event more than one complete application is received within the 30 days immediately following the date of promulgation of these regulations and the total number of skins requested by the applicants exceeds *70,000*, the Director may equitably apportion among the applicants, on the basis of all the evidence, the number of skins authorized to be imported. The sufficiency of the application shall be determined by the Director and, in that connection, he may waive any requirement for information contained therein, or require any elaboration or further information deemed necessary. An application for a permit will include:

(1) Name and address of applicant;
(2) Month and year of taking;

(3) Purpose of importation;
(4) Quantity to be imported;
(5) Proposed date of importation;
(6) Proposed place of importation;
(7) Method of shipment;
(8) Evidence of a commitment from the Republic of South Africa *or a concessionaire* that the applicant will obtain the number of skins stated in the application;
(9) The following certification:

> I hereby certify that the foregoing information is complete, true and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining the benefit of a permit under the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407) and regulations promulgated thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001, or to penalties under the Marine Mammal Protection Act of 1972; and

(10) Signature of the applicant.

b. Permits applied for under this section shall be issued, suspended, modified, or revoked, pursuant to §216.33.

c. Permits applied for under this section shall contain terms and conditions as the Director may deem appropriate, including:

(1) The number of skins which are authorized to be imported;
(2) The location from which they may be imported;
(3) The period during which the permit is valid;
(4) Any requirements for reports or rights of inspection with respect to any activities carried out pursuant to the permit;
(6) The sale or other disposition of the skins; [and]

(7) A reasonable fee covering the costs of issuance of such permit, including an appropriate apportionment of overhead and administrative expenses of the Department of Commerce; *and*

(8) *A method for identifying and tracing skins that have been imported pursuant to a permit.*

d. When the total number of skins authorized to be imported from a particular yearly harvest reaches *70,000* skins, no more permits will be issued for the importation of skins from the harvest.

Section 6 – Taking. The taking of any Cape fur seal after *August 1* in any given year which is not of black pelage shall be conclusive proof that said Cape fur seal was not nursing or less than eight months old at the time of taking. [As to other skins, an applicant for a permit shall have the burden of establishing, by biological data or physical characteristics acceptable to the Director, that individual Cape fur seals taken prior to [. . . . .] were not nursing or less than eight months of age at the time of taking.]

Issued at Washington, D.C.
December 16, 1975
/s/ James W. Mast,

James W. Mast, Administrative Law Judge
Dept. of Housing & Urban Development
415 7th Street, S.W. – Room 7150
Washington, D.C. 20410

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

IMPORTATION OF CAPE FUR SEALSKINS

Decision to Waive Moratorium

* * *

DECISION IN THE MATTER OF THE FOUKE COMPANY APPLICATION TO WAIVE THE MORATORIUM ON THE IMPORTATION OF CAPE FUR SEALSKINS – DOCKET NO. MMPAH No. 1, 1975

The Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407 (the Act), among other things, imposed a moratorium on the importation of marine mammals and marine mammal products. Section 101(a)(3)(A) of the Act provides that the Secretary (of Commerce or of the Interior as appropriate) on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed to determine when, to what extent, if at all, and by what means it is compatible with the Act to waive the moratorium on the taking and/or importation of marine mammals. The authority of the Secretary of Commerce has been delegated to the Director, National Marine Fisheries Service, National Oceanic and Atmospheric Administration (38 FR 4793, February 22, 1973).

Pursuant to this authority and upon application by the Fouke Company, Greenville, South Carolina, proposals to waive the moratorium, subject to certain conditions, to allow the importation of skins from Cape fur seals (*Arctocephalus pusillus pusillus*) which are harvested by or harvested under the auspices of the Republic of South Africa and to promulgate regulations setting forth

the conditions, limitations and procedures for importing these skins were set forth in 40 FR 28469, July 7, 1975.

In connection with the proposals, a Draft Environmental Impact Statement was made available to Federal Agencies and the general public for comment (40 FR 31256). Comments on the Draft Environmental Impact Statement were received from the Department of State, Department of the Interior, Environmental Protection Agency, Friends of the Animals, Inc., Columbia Zoological Park, Department of Labor, Isidore Bergner, British-American Brokers and Francis H. Fay.

In accordance with the Act, the proposals were the subject of a hearing[1] on the record. The hearing was presided over by an Administrative Law Judge (the Judge) and was conducted pursuant to the requirements of the Act, the regulations promulgated thereunder, 50 CFR 216.70-90, and the Administrative Procedure Act, 5 USC 551 et seq.

The following parties participated at the hearing: The Committee for Humane Legislation, Inc.; Friends of the Animals, Inc.; Society for Animal Rights, Inc.; Monitor, Inc. (including Endangered Species Productions, Chesapeake Chapter American Littoral Society, American Littoral Society, Animal Protection Institute, Defenders of Wildlife, Environmental Policy Center, Friends of the Earth, Fund for Animals, International Fund for Animal Welfare – USA, National Parks and Conservation Association, Society for Animal Protection Legislation, Wild Canid Survival and Research Center, Wilderness Society, Committee for the Preservation of the Tule Elk, The

[1]The hearing was conducted in Washington, D.C. and lasted six days (September 18, 19, 20, 22, 23 and 24). A pre-hearing conference was held on September 8, 1975, in Washington, D.C.

Humane Society of the U.S., and the National Audubon Society); The Humane Society of the U.S.;[2] The Marine Mammal Commission (herein the Commission);[3] Diggs et al. (including Charles C. Diggs, Cardiss R. Collins, Johnson J. Conyers, Jr., Ronald V. Dellums, Walter E. Fauntroy, Yvonne B. Burke, Shirley Chisholm, Harold E. Ford, Augustus Hawkins, Ralph H. Metcalfe, Parren J. Mitchell, Charles B. Rangel, Louis Stokes, Andrew Young), The American Committee of Africa; The Washington Office of Africa; the Episcopal Churchmen for South Africa; Theo-Ben Gurirab, the Representative Plenipotentiary of South West Africa Peoples Organization to the United Nations and to the Americas; and the Center for National Security Studies;[4] Michael I. Davis, David I. Kasume, Elizabeth S. Landis;[5] the Republic of South Africa;[6] and the National Marine Fisheries Service.

[2]The Humane Society of the U.S. withdrew as a party in the hearing after the hearing had commenced.

[3]The Commission's Counsel at the hearing indicated that the Commission's participation at the hearing was in satisfaction of the Act's mandate for consultation.

[4]Diggs et al participated in the proceedings only to the extent of arguing the merits of the Motion to amend sections 1, 3(2), and 4(b) of the proposed regulations; to exclude from the hearings thereon certain testimony, and to prohibit dealings by the Department of Commerce with South Africa in regard to or in Namibia.

[5]Michael J. Davis, David J. Kasume, and Elizabeth S. Landis, pursuant to the Proposed Waiver, submitted testimony going to the merits of Motion noted above in footnote 3, but otherwise did not participate in the proceedings.

[6]The Republic of South Africa, submitted testimony, but withdrew from the proceedings prior to the pre-hearing conference.

The hearing focussed on the following issues:

1. The Motion to amend sections 1, 3(a), and 4(b) of the Proposed Regulations and to Exclude from the Hearings Thereon Certain Testimony.

2. The estimated existing levels of the species and population stocks of the Cape fur seal.

3. The optimum sustainable population of the Cape fur seal.

4. The anticipated effect of the proposed waiver on the optimum sustainable population of the Cape fur seal.

5. A harvesting date to ensure seals are not pregnant, nursing, or less than 8 months of age at time of taking, or biological data and physical characteristics acceptable in lieu of said date.

6. The adequacy of the South African government's management program to insure the harvesting is in accord with sound principles of resource protection and conservation as provided for by the purposes and policies of the Marine Mammal Protection Act.

7. The humaneness of the 1975 harvest including the standard for humaneness and supervision to insure humaneness.

8. The impact of the proposed waiver on the marine ecosystem and related environmental considerations, such as distribution, abundance, feeding habits, and migratory movements within the ecosystem.

9. Whether there is a conflict of interest in consideration of the waiver of the moratorium, and in any waiver which may be granted, because of certain specifications in existing contracts between the Administration and the Applicant.

The Judge, based upon the evidence of record, recommended to me in accordance with 50 CFR 216.89, on December 16, 1975 (his recommendation was received by me on December 22, 1975) that the proposals of July 7th be implemented with certain suggested modifications. On December 31, 1975, I informed the public of receipt of the Judge's recommended decision, afforded the public opportunity to review the recommended decision and invited the public to comment on it (40 FR 60105). As a result of this notice comments from the following were received within the 20 days prescribed for receipt of comments: Parties to the proceeding; Committee for Humane Legislation, Inc.; Friends of Animals, Inc.; Monitor Inc.; Diggs, et al; and the Marine Mammal Commission; numerous letters were received from the general public. In addition, the Council on Environmental Quality submitted comments. The Council on Environmental Quality was not a party to the proceeding.

Following a review of the record, the Judge's recommended decision and comments from the public, I hereby adopt and incorporate by reference the Judge's decision except insofar as it is inconsistent with what is hereinafter set forth. In some instances, although accepting the Judge's conclusions on various issues, I have, in the interest of clarity, addressed the issues in more detail.

In deciding whether to waive the moratorium, it is my duty, as I understand the Act, to be assured that the taking in the country of concern is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the Act. My decision must be supported by the evidence of record. That evidence, according to the Act, is to be the best scientific evidence available. The Public, including those government agencies with special expertise and responsibilities

with respect to marine mammals, was afforded an opportunity to participate and, consistent with the rules applicable to the introduction of evidence at a formal hearing on the record, to introduce scientific evidence at the hearing. In view of this and after having reviewed the record, it is my conclusion that the record contains the best scientific evidence available and further that this evidence forms a sufficient basis for the action I have taken.

In reaching this conclusion, I recognize that there are those who have argued that the evidence is not sufficient to form a basis upon which to waive the moratorium. They have argued that a decision should await the amassing of more data. However, in wildlife management, because of its dynamic character, the call for more data can always be heard. The Act, in my opinion, by using the phrase "best scientific evidence available" rather than "best scientific evidence possible" rejected such an approach, provided, there is sufficient evidence of record upon which to act. This is not to say that additional data are not welcome. Indeed, it is urged elsewhere in my decision that such data be obtained.

As the Judge properly noted, the concept of optimum sustainable population (OSP) established by the Act does not represent a statutory application of generally accepted scientific terminology. It is rather a relatively new concept; one which, among other things, does not focus on yield or harvest but focuses on the health and stability of the ecosystem. Consequently, the reference by the Judge to the concept maximum sustainable yield, a term generally associated with harvest, is inappropriate.

I have concluded from studying the Act and the record that OSP is not a fixed population level, but a population range. The lower point of this range is that

level of abundance which results in maximum productivity, the greatest annual increase in numbers of animals. The upper point of this range is that level of abundance at the carrying capacity of the habitat. Within this range the population level to be maintained will depend upon the emphasis given certain factors which may be considered under the Act such as the international significance of marine mammals as well as their esthetic, economic and recreational significance.

The Act recognizes that the level of maximum productivity is not a permanently fixed level in a natural population, but will vary over time with fundamental changes in environmental conditions and other factors independent of man as indicated in the Act's definition of OSP which states "* * * the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the optimum carrying capacity of the habitat and health of the ecosystem of which they form a constituent element".

Determination of exact population levels of marine mammals in the wild, or other important statistics of these populations, is difficult as evidenced by the record now before me. The degree of uncertainty surrounding such estimates will vary with the depth and precision of scientific knowledge available about any population, the stability of the population and the environment and other factors. Consequently, in determining the lower point of the range for OSP, a reasonable margin of safety commensurate with the degree of existing scientific knowledge and other factors will be added to the population level which results in maximum productivity.

Applying this to the facts developed in the record, I conclude that the population of Cape fur seals, at this time, is within the range of OSP and that a harvest of up

to 70,000 Cape fur seals will not depress the population below this level under present conditions. This is the same conclusion reached by the Judge. In arriving at his conclusion, the Judge observed that the OSP is within the same general range as the level of population which produces maximum sustainable yield (MSY).[7]

As noted by me, the use of the phrase MSY is not appropriate in view of the primary objective of the Act and the definition of OSP which relates OSP to maximum productivity and optimum carrying capacity of the habitat. However, the use of the phrase MSY in this instance raises more a question of phraseology rather than of substance and does not affect the Judge's conclusion for, as the record clearly indicates, the level of population which results in maximum productivity is within the same general range as the level of population which results in MSY. Therefore, the use of either concept in this particular case will result in the same conclusion, although there is objection to the use of MSY for the reasons I noted.

I am aware that the argument has been advanced that the South African Government's management program is based upon the concept of MSY and therefore cannot be found to be consistent with the purposes and policies of the Act. However, from my review of the record, it is clear that the South African management program, among other things, has as one of its objectives a healthy and stable ecosystem and therefore, in my opinion, is consistent with the purposes and policies of the Act.

[7] The Judge in his opinion equated the level of OSP with MSY rather than, as it should have been equated, with the level of population which produces MSY. It is apparent, however, that he intended the latter for in a footnote to this discussion he references the views of this agency's staff which in its written brief makes the correct distinction.

On page 6 of the decision, the Judge states, "While recognizing the social value of a balanced ecosystem the statute equally recognized the economic and commercial value of marine mammals and marine mammal products." Although it is clear that this language, when read in the context of the entire decision, has relevance only within a framework of a healthy and stable ecosystem, I reject that portion of it which may imply that economic and commercial values are on a par with maintaining a healthy and stable ecosystem when deciding whether to waive the moratorium. The primary objective of the Act is to maintain a healthy and stable ecosystem, and it is this objective, as well as others provided in the Act, that I considered, when reviewing the record.

On page 32 of his decision the Judge states, "But in these areas it would be unfair to both the Republic of South Africa and to the Applicant to impose more restrictive standards on South African seal skins which are imported than are presently imposed on the United States Government's own harvest in the Pribilof Islands." I reject this language. The standards to be applied in determining to waive the moratorium, and the standards which I applied in this case, are those set forth in the Act. The harvest of the fur seal herds on the Pribilof Islands is excluded from the Act's coverage. The standards used there, even if coincidentally the same as those required by the Act, are not to be used in lieu of the Act's requirements.

I have accepted without modification the Judge's views with respect to the issue of humaneness. In doing so, I am mindful of the arguments made to the Judge and to me that, among other things:

(a) Not all harvests were observed by the veterinarians under contract with the National Marine Fisheries Service

and therefore, the skins from unobserved harvests cannot be imported for I cannot make a determination that the seals, from which these skins were taken, were harvested in a humane manner; and

(b) Based upon the testimony presented concerning the frequency of second blows administered to seals, I can not determine the harvests to be humane.

With respect to the first point, the record indicates that approximately 72 percent of the total seals harvested annually (1969-1973) are harvested at two locations. It was at these two locations that the veterinarians under contract with the National Marine Fisheries Service made the sample observations which formed the basis for their conclusions that the harvests were conducted in a humane manner within the meaning of the Act. Under the circumstances, in my opinion, the observations of these veterinarians represent a fair sample upon which to base a professional judgment. I accept their judgment. Moreover, in view of the veterinarians' conclusions and the assertions on the record by responsible officials from the Republic of South Africa concerning harvesting methods I have concluded that it is reasonable to accept a certification from South African officials with respect to humaneness, as set forth in the regulations associated with the waiver.

With respect to the second point, the record indicates that when there is any doubt, well founded or not, about the adequacy of the first blow to a seal, it is prudent to administer a second blow. Therefore, the administering of a second blow, in and of itself, is not necessarily significant. The record further indicates that an important factor is the length of time between the first and second blows, for, if the animal is conscious after the first blow, it could be in pain until rendered unconscious

by a second blow. The shorter this interval, the shorter the period of time in which the animal may be in pain. With these principles in mind, based upon the evidence of record, it is my conclusion that the number of occasions when second blows were administered was not sufficient to warrant a finding of inhumaneness, especially in view of the fact that second blows are encouraged as a safety measure when there is any doubt whatsoever about the adequacy of the first blow. Further, the time interval from first blow to second was sufficiently short, and thus to the extent practicable minimized the pain to those animals not rendered unconscious by a first blow, so as not to warrant a finding of inhumaneness.

After having reviewed the record, the Act and the Judge's decision, I conclude that in determining the age of the Cape fur seal for purposes of the Act's requirements a mean birthdate is to be used. As the record shows, it is impossible to determine the exact birthdate of seals born in the wild. This difficulty is present with other animals born in the wild. As a consequence, the use of a mean birthdate is an accepted method of determining age in wildlife management. The Act is primarily a wildlife management Act dedicated to attaining a healthy and stable ecosystem. In this connection, the Act speaks in terms of managing populations and population stocks, not in terms of managing one animal within a population or population stock. Under the circumstances, it is reasonable to determine age by using a mean birthdate when implementing the Act. From the evidence of record that date for the Cape fur seal is December 1, for any given pupping season.

The issue of when obligate nursing[8] ceases was not only an issue which consumed the attention of many at the

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[8]The Act contemplated the issuance of interpretative rules. The rule on nursing as including only obligatory nursing was pro-

[footnote continued]

hearing but was also the focus of attention in many of the comments I received. It justifies further comment by me.

The only witnesses at the hearing who qualified as experts on nursing testified that obligate nursing ceased, at least, prior to the beginning of the eighth month after birth. There is nothing in the record, which, in my opinion, is cause to reject the testimony of these experts. If those who argue that obligate nursing had not ceased prior to eight months after birth had, at the hearing, chosen to present a qualified expert to offer testimony on their position, I would have had to weigh such testimony in reaching my conclusion; but they did not. In reaching my decision in this matter, I am to consider the evidence of record, and that evidence is that qualified experts conclude that obligate nursing for the Cape fur seal ceases, at least, prior to the beginning of the eighth month after birth. There is little reason for me to doubt the witnesses' truthfulness or the soundness of their scientific judgment.

The Judge recommended certain conditions to the waiver. These conditions focused on the desirability of additional information. This recommendation is consistent both with the Act's recognition of the need for additional data on marine mammals, and its recognition that conservation measures should be international in scope. However, I have concluded that the application of sys-

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posed under rule making procedures on January 28, 1975, 40 FR 4660 (January 31, 1975). After consideration of the proposed rule and comments received, the rule was promulgated on April 18, 1975, 40 FR 17845 (April 23, 1975). The Judge concluded that the interpretative ruling was controlling in this proceeding. The interpretative ruling provides that, nursing means nursing which is obligatory for the physical health and survival of the nursing animal.

tematic scientific programs which will provide the additional information requested by the Judge, in the long run, is the best way to approach wildlife management. It is for this reason that I have modified the conditions of the waiver to focus clearly on such programs. The data developed as a result of implementing these programs are the data the Judge recommended obtaining, and to this extent my modifications do not change what he recommended.

It should be noted that my decision to waive the moratorium is not predicated on data that may be obtained in the future through the implementation of such programs but on the evidence developed in the record. Continuation of the waiver will, however, require data which will indicate that conditions warrant its continuation. These programs will facilitate obtaining this data in a more systematic manner.

The Judge's recommended conditions are modified as follows:

(1) Develop a program which will provide additional information regarding age, sex, mortality, rate, and fecundity rate of Cape fur seals;

(2) Expand the program of tagging, aerial photographs and other methods of collecting data, in order to provide systematic monitoring of the level of the Cape fur seal population;

(3) Develop a program which will provide additional information on the interrelationship of the Cape fur seal and its ecosystem;

(4) Expand upon programs to ensure the continuation of acceptable standards of humane taking;

(5) And annually provide data sufficient to assess whether conditions warrant continuation of the waiver.

Pursuant to section 101(a)(3)(A) of the Act, I certify that, based on the record, the program of the Republic of South Africa for taking Cape fur seals is consistent with the provisions and policies of the Act.

In view of the foregoing, I conclude that the evidence of record supports a waiver of the moratorium to allow the importation of up to 70,000 skins from Cape fur seals from each annual harvest, commencing with the 1975 harvest, conducted by or under the auspices of the Republic of South Africa, subject to the conditions previously mentioned. This conclusion is based upon the scientific evidence of record.

At the initial stages of this proceeding a motion was filed (by Diggs et al. and joined in by others) raising certain foreign policy issues. The Judge concluded that he did not have jurisdiction to address the merits of the matters raised in this motion (and its reassertion) in view of section 553(a) of the Administrative Procedure Act, 5 U.S.C. 553(a). I accept the Judge's ruling in this regard. However, the jurisdictional limitations which apply to the Judge do not apply to me. I have studied the issues raised in the Motion. They are complex and require further analysis. Therefore, I have reserved judgment, at this time, on these matters.

The net effect, should I rule favorably on the Motion, would be to exclude from a waiver the importation of skins of Cape fur seals harvested in Namibia. Should I deny the Motion, skins of Cape fur seals harvested in Namibia would be subject to a waiver. Skins from Cape fur seals harvested in South Africa would not be affected by a ruling either way on the Motion. Consequently, I have decided, at this time, to waive the moratorium as it pertains to the importation of skins of Cape fur seals harvested in South Africa and to reserve judgment on

skins of Cape fur seals harvested in Namibia. Upon resolution of the issues raised by the Motion. I will decide whether skins from Cape fur seals harvested in Namibia should be subject to a waiver and this decision will be supplemented accordingly. In this connection, I wish to reemphasize that the scientific evidence of record at this time supports waiving the moratorium with respect to skins of Cape fur seals harvested in Namibia.

Since South Africa is, in fact, managing the Cape fur seal herds in Namibia, that management will be considered and reviewed by me in deciding whether to continue the moratorium regardless of my decision with respect to skins of Cape fur seals taken in Namibia. The Cape fur seal herd is one population and will be considered as such in the exercise of my responsibilities under the Act although, at this time, only skins from Cape fur seals harvested in South Africa may be imported.

From a review of the record, recent harvesting data (1969-1973) indicate that 27.4 percent of the Cape fur seals harvested by or under the auspices of South Africa are harvested on rookeries within South Africa. Therefore, 27.4 percent of the 70,000 animals which may be harvested from the total population under the conditions of the waiver, or 19,180, represents the upper limit of the number of skins which may be imported from South Africa.

Based on the foregoing, I waive the moratorium as follows.

WAIVER

The moratorium on importation is waived to permit the importation of up to 19,180 skins of Cape fur seals (*Arctocephalus pusillus pusillus*) harvested within the Republic of South Africa and harvested by or under the

auspices of the Republic of South Africa and under the following conditions:

(a) No more than 70,000 Cape fur seals are harvested in any one annual harvest conducted by or under the auspices of the Republic of South Africa commencing with the 1975 harvest. This level of harvest will be adjusted to reflect the results of an annual review conducted pursuant to subsection (e) which may indicate that a different harvest level is appropriate to allow the population to remain within the range of optimum sustainable population, in which case the aforementioned figures of 70,000 seals and 19,180 seal skins will be adjusted accordingly, commencing with the 1976 harvest.

(b) The upper limit to the number of skins which may be imported is predicated upon the percent of the total harvest which recently has occurred in South Africa. The results of an annual review conducted pursuant to subsection (e) may suggest a change in this percentage, due to a change in harvesting practices, in which case the upper limit will be adjusted accordingly: *Provided, however,* That such a shift in harvesting practices is consistent with the purposes and policies set forth in the Act.

(c) The skins were taken from Cape fur seals which at the time of taking were not:

(1) Nursing
(2) Pregnant, or
(3) Less than eight months old.

(d) The skins are from Cape fur seals not taken in a manner deemed inhumane by the Director:

(e) Skins from Cape fur seals harvested subsequent to 1975 may be imported: *Provided,* The Director upon annual review determines that conditions so warrant continuation of the waiver. This review will include, among other things, an assessment of whether efforts have been made, in good faith, to:

(1) Develop a program which will provide additional information regarding age, sex, mortality rate, and fecundity rate of Cape fur seals;

(2) Expand the program of tagging, aerial photographs and other methods of collecting data, in order to provide an accurate and systematic monitoring of the Cape fur seal population;

(3) Develop a program which will provide additional information on the interrelationship of the Cape fur seal and its ecosystem; and

(4) Expand upon programs to insure the continuation of acceptable standards of humane taking.

In order to implement this waiver, the appropriate regulations will be amended to include the following:

SECTION 1 *Purpose.* The Director, waived the moratorium on importation in order to allow the importation of up to 19,180 skins from Cape fur seals (*Arctocephalus pusillus pusillus*), harvested by or harvested under the auspices of the Republic of South Africa, within the Republic of South Africa (excluding Namibia) subject to certain conditions and limitations. The purpose of these regulations is to establish the criteria, conditions and procedures for importing these skins.

SEC. 2 *Scope.* This section applies to the importation of skins from Cape fur seals which are subject to the waiver by the Director.

SEC. 3 *Definitions.* In addition to the definitions contained in the Act, these regulations, and unless the context otherwise requires, in this section:

a. "Cape fur seals" means fur seals scientifically designated as *Arctocephalus pusillus pusillus.*

b. "Eight months old" means eight months old as determined by using a mean birthdate for the Cape fur seal of December 1 for any one pupping season.

c. "Namibia" means that territory formerly known as South West Africa.

d. "Nursing" means nursing which is obligatory for the physical health and survival of the nursing animal.

SEC. 4 *Prohibitions.* It is unlawful to import skins from Cape fur seals except under the following circumstances:

a. For skins imported for processing or finished skins not previously imported for processing:

1. Such importation is pursuant to a permit issued by the Director in accordance with these regulations;

2. Any skins imported are accompanied by a Certification by the Minister of Fisheries, Republic of South Africa, in such form as the Director shall approve, to the effect that such skins are from Cape fur seals which:

A. Were taken in a manner as determined by the Director to be humane;

B. Were taken from an annual harvest which did not exceed 70,000 Cape fur seals;

C. Were taken on or after August 1, for any given annual harvest and were not of black pelage;

D. Were not taken in violation of the law of the Republic of South Africa; and

E. Were not taken from within the territory known as Namibia.

b. For finished skins previously imported under a permit. No permit is required for skins previously imported under permit. However, markings on the skins consistent with the requirements of the permit under which they were previously imported, are required for importation.

SEC. 5 *Importation permits.* a. The Director may issue permits authorizing the importation of Cape fur seal skins. Any person desiring to obtain such a permit may make application to the Director. The sufficiency of the application shall be determined by the Director and, in that connection, he may waive any requirement for information contained therein, or require any elaboration or further information deemed necessary. An application for a permit, where applicable, will include:

1. Name and address of applicant;
2. Month and year of taking;
3. Purpose of importation;
4. Quantity to be imported;
5. Proposed date of importation;
6. Proposed place of importation;
7. Method of shipment;
8. Evidence of a commitment from the Republic of South Africa or a concessionaire that the applicant will obtain the number of skins stated in the application;
9. A copy of the Certification required by section 4a(2).
10. The following certification:

I hereby certify that the foregoing information is complete, true and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining the benefit of a permit under the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407) and regulations promulgated thereunder, and that any false statement may subject me to the criminal

penalties of 18 U.S.C. 1001, or to penalties under the Marine Mammal Protection Act of 1972; and

11. Signature of the applicant.

b. Permits applied for under this section shall be issued, suspended, modified, or revoked pursuant to §216.33.

c. Permits applied for under this section shall contain terms and conditions as the Director may deem appropriate, including:

1. The number of skins which are authorized to be imported;

2. The location from which they may be imported;

3. The period during which the permit is valid;

4. Any requirements for reports or rights of inspection with respect to any activities carried out pursuant to the permit;

5. The transferability or assignability of the permit;

6. The sale or other disposition of the skins;

7. A reasonable fee covering the costs of issuance of such permit, including an appropriate apportionment of overhead and administrative expenses of the Department of Commerce; and

8. A method for identifying and tracing skins that have been imported pursuant to a permit.

d. Applications for permits must include payment of a fee of $100,000. The Director may change the amount of this fee at any time he determines a different payment to be reasonable, and said change may be accomplished by publication in the FEDERAL REGISTER of the new payment required, without the necessity of amending these regulations.

e. When the total number of skins authorized to be imported from a particular yearly harvest reaches 19,180 skins, no more permits will be issued for the importation of skins from the harvest.

Dated: February 12, 1976.

Robert W. Schoning,
National Marine Fisheries Service.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

ANIMAL WELFARE INSTITUTE, et al., *Plaintiffs* *v.* ELLIOTT L. RICHARDSON, et al., *Defendants* and FOUKE COMPANY, INC., *Defendant/Intervenor*	**Civil Action 76-0483**
COMMITTEE FOR HUMANE LEGISLATION, INC., et al., *Plaintiffs,* *v.* ELLIOTT L. RICHARDSON, et al., *Defendants* and FOUKE COMPANY, INC., *Defendant/Intervenor*	**Civil Action 76-0484**

MEMORANDUM AND ORDER

These cases, consolidated for all purposes by order of this Court, are before the Court on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction

to enjoin the Defendant Secretary of Commerce from issuing a permit to the Defendant Intervenor Fouke Company to permit the importation of 13,000 seal skins from the Republic of South Africa. For the reasons set forth below the Court has determined that the Plaintiffs' Motion should be denied and the cases dismissed.

The permit to be issued is pursuant to the Marine Mammal Protection Act of 1972, 16 U.S.C. §1361, et seq. The Act imposed a moratorium on the taking and importing of marine mammals and marine mammal products but allowed the Secretary to grant a waiver of the moratorium and allow importation under certain conditions. A waiver was granted in regard to the importation of Cape fur seal skins, and the Fouke Company applied for and was granted a permit to ship the seal skins to this country.

Plaintiffs challenge the granting of the permit on the grounds that it would result in the importation of seals that were taken while they were nursing, seals that were less than eight months old at the time of taking; and seals that were taken in an inhumane manner each of which is prohibited under the Act. Plaintiffs also argue that the program under which the seals were taken could not have been certified by the Defendants as being consistent with the policies and procedures of the Act. The Court does not find it necessary to reach the merits of the case as the Plaintiffs have not shown that they have the requisite standing to bring this action.

The basic guidelines for standing as enunciated by the Supreme Court require that the party bringing the action have a sufficient stake in a justiciable controversy to obtain judicial resolution of that controversy. *Sierra Club v. Morton,* 405 U.S. 727, (1972). The Supreme Court has held that standing encompasses a determination that the

challenged action has caused the Plaintiffs "injury in fact" and that the alleged injury was to an interest "arguably within the zone of interests to be protected." *Data Processing Service v. Camp,* 397 U.S. 150 (1970). The Court does not quarrel with the Plaintiffs' assertion that they have an interest within the zone of interests to be protected. Aesthetic and environmental concerns are deserving of legal protection. What is missing from Plaintiffs' argument is a showing that the Plaintiffs themselves are or can be substantively injured. *Sierra Club v. Morton, supra* at 735.

Plaintitfs allege that they have an interest in the maintenance of a sale, healthful environment for marine mammals, including the Cape fur seal, in natural conditions and under humane treatment and that the decision made by the Secretary will impair that interest. It is important to note that what is before the Court is the determination of how the Plaintiffs will be injured by the action of the Defendants. Plaintiffs' assertion of interference with an interest in studying the Cape fur seal is speculative at best. In fact the Cape area for various reasons, is well protected and accessible only with the special permission of the South African Government.[1]

There is nothing on this record to show that Plaintiffs, however great their interests are, are on any different footing from any other concerned citizen. Such generalized harm as Plaintiffs allege does not normally warrant exercise of jurisdiction. *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208 (1974). Absent a statute

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[1] An affidavit submitted by the Plaintiffs does state that one of the members of Plaintiff organization does intend to visit South Africa for the purpose of studying the seals but it is not clear to the Court that the permission of the South African Government has been secured.

that authorizes suits by concerned citizens functioning as "private attorneys generals,"[2] the Court must follow the strict standing requirements as laid down by the Supreme Court in *Sierra Club v. Morton, supra* and subsequent cases.[3]

Accordingly, it is this 23rd day of December, 1976,

ORDERED, that the Motions be and they hereby are DENIED; and it is

FURTHER ORDERED, that the cases be and they are hereby DISMISSED.

/s/ Aubrey E. Robinson, Jr.

Aubrey E. Robinson, Jr.
United States District Judge.

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[2]Section 104 of the Act cannot be held to authorize suits under this rationale.

[3]Warth v. Seldin, ____ U.S. ____, 95 S. Ct. 2197 (1975), Simon v. Eastern Kentucky Welfare Rights Organization, ____ U.S. ____, 96 S. Ct. 1917 (1975).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2148

ANIMAL WELFARE INSTITUTE, *et al.*, APPELLANTS

v.

JUANITA KREPS, Secretary of Commerce of the United States, *et al.*

No. 76-2149

COMMITTEE FOR HUMANE LEGISLATION, INC. and FRIENDS OF ANIMALS, INC., APPELLANTS

v.

JUANITA KREPS, Secretary of Commerce of the United States, *et al.*

Appeals from the United States District Court for the District of Columbia

(D.C. Civil Actions Nos. 76-0483 & 76-0484)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued May 3, 1977

Decided July 27, 1977

Leonard C. Meeker, with whom *Richard A. Frank* was on the brief, for appellants in No. 76-2148.

Margaret Strand, Attorney, Department of Justice, with whom *Peter R. Taft*, Assistant Attorney General, and *Bruce C. Rashkow*, Attorney, Department of Justice, were on the brief, for appellee Kreps.

James P. Davenport, with whom *Lucien Hilmer* was on the brief, for appellee The Fouke Company. *Ronald G. Precup* also entered an appearance for appellee The Fouke Company.

Bernard Fensterwald, Jr. entered an appearance for appellants in No. 76-2149.

Before WRIGHT, MCGOWAN, and TAMM, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: These appeals arise from a complaint filed in the District Court challenging a decision by the Government appellees to waive the moratorium imposed by the Marine Mammal Protection Act (MMPA)[1] so as to permit importation into the United States from South Africa of baby fur sealskins. Appellants are eight environmental groups.[2] The District Court dismissed the suit on the ground that appellants lacked standing to sue. We reverse, holding that appellants do have standing and that the Government's decision to waive the ban on importing baby fur sealskins violates the Marine Mammal Protection Act.

[1] 16 U.S.C. § 1361 *et seq.* (Supp. V 1975).

[2] Animal Welfare Institute, Defenders of Wildlife, Friends of the Earth, Inc., Fund for Animals, Inc., Humane Society of the United States, International Fund for Animal Welfare, Committee for Humane Legislation, Inc., and Friends of Animals, Inc.

I. HISTORY OF THE CASE

A brief sketch of the statutory scheme is necessary at this point. The MMPA imposes a moratorium on taking or importation of marine mammals or marine mammal products. The Director of the National Marine Fisheries Service (NMFS) can waive the moratorium to allow taking or importation according to the detailed procedural and substantive requirements of the Act. Waiving the moratorium is a two-stage process. In the first stage the agency must determine if there will be a waiver and promulgate regulations containing the terms of the waiver. In the second stage the agency may issue permits authorizing importation to particular applicants.

The annual harvest of baby seals takes place in South Africa in the fall of the year. In 1975 appellee Fouke Company, an importer, sought a waiver and a permit to allow it to import skins from the 1975 harvest. Throughout the administrative proceedings appellants vigorously opposed the waiver. In February 1976 the Director reached a decision that the Cape fur seal herd could sustain a taking of up to 70,000 seals per year. He therefore waived the moratorium on the condition that the total harvest in South Africa not exceed 70,000.[3]

At this point appellants filed their complaint,[4] alleg-

[3] 50 C.F.R. § 216.32 (1976).

[4] Jurisdiction was based in the complaint upon 28 U.S.C. §§ 1331, 1337, and 1361, and 5 U.S.C. §§ 701-706. The Supreme Court has recently held that the Administrative Procedure Act, 5 U.S.C. §§ 701-706, is not an independent grant of subject matter jurisdiction. *Califano v. Sanders*, —— U.S. ——, 45 U.S. L. WEEK 4209 (Feb. 23, 1977). Nevertheless, jurisdiction is proper under §§ 1331 and 1337.

ing that the waiver was illegal because (1) seals less than eight months old would be imported, contrary to Section 102(b)(2) of the Act;[5] (2) nursing seals would be imported, contrary to the same section; (3) seals taken in an inhumane manner would be imported, contrary to Section 102(b)(4);[6] and (4) the program of taking marine mammals in South Africa is not consistent with the provisions and policies of the MMPA as required by Section 101(a)(3)(A).[7]

Soon after the complaint was filed and while Fouke's application for a permit was still pending, it became known that the 1975 harvest had exceeded 70,000 seals. Fouke therefore withdrew its application for a permit. Then, in June 1976, the District Court dismissed the suit on the ground that there was no longer a justiciable controversy since the waiver had been cancelled by the failure of its condition. The error in this disposition, as the parties soon pointed out to the court, was that the waiver had continuing validity, subject to annual review,[8] and the condition had failed only in regard to the 1975 harvest. The waiver remained and could become the basis for a permit to import in any future year in which the seal harvest did not exceed 70,000. Therefore, on July 22, 1976 the court vacated its order dismissing the suit and reinstated the complaint.

The Government then completed its 1976 annual review and decided that conditions continued to justify the waiver. In the fall of 1976 Fouke applied for a permit to import some 13,000 sealskins from the 1976 harvest. Notice of the application was published in the *Federal*

[5] 16 U.S.C. § 1372(b)(2) (Supp. V 1975).

[6] 16 U.S.C. § 1372(b)(4) (Supp. V 1975).

[7] 16 U.S.C. § 1371(a)(3)(A) (Supp. V 1975).

[8] 50 C.F.R. § 216.32(a)(1) (1976).

Register[9] and appellants promptly submitted their views, urging that the application be denied or at least held in abeyance pending resolution of their suit challenging the waiver. However, notice that the permit had been granted appeared on December 15, 1976.[10] Appellants immediately moved in the District Court for a temporary restraining order and preliminary injunction aimed at preventing importation of the 13,000 sealskins covered by the permit. The District Court denied appellants' motion and dismissed the suit, holding that appellants lacked standing to sue.

Appellants appealed. On December 28, 1976 this court refused to enjoin the importation pending appeal, but agreed to expedite the appeal, and it was stipulated that the briefs on appeal would address the merits of the validity of the waiver as well as the issue of standing.

II. Standing

The gist of the problem of standing is whether the party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends * * *."[11] While that much remains clear and has its roots in the Constitution, application of the principle to a particular complaining party has become difficult in the wake of rapidly developing case law. There is no single test to be derived from the case law to determine if a particular party has standing to sue. Rather, at least three separate inquiries can be distilled from the Supreme Court cases on standing. They are (1) the existence of an injury in fact,

[9] 41 Fed. Reg. 48149 (1976).

[10] 41 Fed. Reg. 54790 (1976).

[11] *Baker v. Carr*, 369 U.S. 186, 204 (1962).

(2) whether the requisite causal connection exists between plaintiff's injury and defendant's action, and (3) whether the interest to which injury is claimed is arguably within the zone of interests to be protected by the statute.

A. *Statutory Basis*

Before embarking on these inquiries, however, we must consider whether the MMPA itself confers standing on appellants. For, while Congress cannot of course authorize exercise of judicial power in the absence of a case or controversy, the Supreme Court has held that the injury required by Article III may exist solely by virtue of a statute: "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." [12] A finding that Congress has expressly, "or by clear implication," [13] conferred standing on appellants would thus obviate the other inquiries.

Unfortunately, the MMPA is not perfectly clear on this point. With regard to *permits* the Act provides for public notice and full participation by all "interested parties" in the proceedings on a permit application.[14] Following the agency decision, "[a]ny applicant for a permit, *or any party opposed* to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit." [15] There can be no doubt

[12] *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). *Accord, Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

[13] *Warth v. Seldin, supra* note 12, 422 U.S. at 501.

[14] 16 U.S.C. § 1374(d) (Supp. V 1975).

[15] 16 U.S.C. § 1374(d)(6) (Supp. V 1975) (emphasis added).

that appellants—eight environmental groups which participated fully in the administrative proceedings and vigorously opposed grant of the permit to Fouke—qualify as "parties opposed."

With regard to *regulations*, the MMPA requires that they be made on the record after opportunity for an agency hearing and provides for notice to the "public" of the bases for the regulations.[16] But no special provision for judicial review is included. Nevertheless, the legislative history reveals that Congress clearly intended judicial review to be available under the general federal jurisdictional statutes.[17] We conclude that Congress implicitly intended to confer standing to challenge waiver regulations on the same categories of people to whom it gave standing to challenge permits.

We base this conclusion upon the nature of the statutory waiver-permit scheme. It is clear that appellants would have standing under the statute to challenge each and every successive permit issued pursuant to the waiver which they oppose. Yet a requirement that appellants take this route would be unnecessarily wasteful of judicial resources. Further, in addition to being inefficient, seeking review of each permit would be ineffective. There would rarely be enough time for full judicial review of any particular permit before the importation took place.[18]

[16] 16 U.S.C. § 1373(d) (Supp. V 1975).

[17] *See* S. Rep. No. 863, 92d Cong., 2d Sess. 7-8 (1972); H.R. Conf. Rep. No. 1488, 92d Cong., 2d Sess. 22-23 (1972). The general federal jurisdictional statutes relevant here are 28 U.S.C. §§ 1331 and 1337.

[18] This fear was borne out in the case of the 1976 permit to Fouke. The permit was issued on December 10, 1976. Notice of issuance was published on December 15. 41 FED. REG. 54790 (1976). Fouke ordered the ship carrying the sealskins to sail from South Africa not later than December 29. JA Annex H. Moreover, the permit by its terms expired on April 1, 1977. Annex D to Plaintiffs' Motion for Temporary Restraining Order of December 21, 1976. Consequently, the issue

For these reasons, appellants originally framed their suit as a challenge to the waiver regulations. But their suit also clearly encompassed a challenge to the *permit* granted to Fouke,[19] and to any future permit, because a permit does nothing more than apply the general authorization contained in the regulations to a particular person.[20] In fact the permit issued to Fouke expressly stated that it was "subject to" the waiver regulations and recited most of those regulations.[21] Thus the "terms and conditions" of the permit—which appellants are expressly given standing to challenge[22]—*are* the regulations. Just as opposition to the regulations implies opposition to any permit granted thereunder, a challenge to a permit implies a challenge to the regulations.

In view of this interrelationship, to find that Congress gave appellants standing to challenge permits, but not to challenge waiver regulations, would be to exalt form over substance. Accordingly, we hold that appellants' claim of standing here has a firm statutory foundation. Moreover, even if the statute did not provide the answer, appellants also satisfy the three prerequisites for standing in the absence of a statutory grant. We turn now to those tests.

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now before us is only the continuing validity of the waiver regulations, and not the validity of any particular permit.

[19] And, as a matter of fact, when the Government granted the permit to Fouke, appellants immediately moved for a temporary restraining order and a preliminary injunction against it.

[20] This is particularly true in the context of sealskin importing, in that Fouke, as the only importer of sealskins into the United States, is the *only* potential beneficiary of the waiver. Fouke's brief at 4; S. Rep. No. 863, *supra* note 17, at 3.

[21] Annex D to Plaintiffs' Motion for Temporary Restraining Order of December 21, 1976.

[22] 16 U.S.C. § 1374(d)(6) (Supp. V 1975).

B. *Traditional Analysis*

1. *Injury in Fact*

The first and most basic requirement is that appellants allege some injury in fact.[23] Appellants are eight organizations devoted to preservation of wildlife and humane treatment of animals. In their complaint they allege:

> 10. The Plaintiff organizations bring this action on behalf of themselves and their members, each of whom has a personal stake in the maintenance of a safe, healthful and productive environment and in the protection of marine mammals. The decision of the Defendants described herein will contribute to the death and injury of marine mammals and injury to the ecosystem of the South Atlantic Ocean. The Defendants' decision will cause the members of the Plaintiff organizations injury and will adversely affect them in one or more of their activities or recreational pursuits. The decision impairs the interests of the Plaintiff organizations and their members in observing and studying marine mammals including the Cape fur seal. Through sanctioning the seal harvesting method of the South African Government, the Defendants' decision impairs the ability of members of the Plaintiff organizations to see, photograph, and enjoy Cape fur seals alive in their natural habitat under conditions in which the animals are not subject to excessive harvesting, inhumane treatment and slaughter of pups that are very young and still nursing. The Defendants' decision impairs the efforts of the Plaintiff organizations and their members to assure the carrying out of sound conservation practices with respect to the Cape fur seal, in accordance with the MMPA. The decision impairs their efforts to assure humane treatment of marine mam-

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[23] *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

> mals in conformity with the Act. The MMPA was enacted in response to public outcry against the commercial exploitation of very young and still nursing marine mammals, particularly seals. The Defendants' decision impairs the interests of the Plaintiff organizations and their members in seeing to it that the provisions of the MMPA are given full effect in accordance with the mandate of Congress.

JA Annex B at 7-8. In examining this claim we cannot ignore the fact that the MMPA is an unusual statute: its sole purpose is to promote protection of animals. Where an act is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute. But we need not rely on this observation, because appellants allege injury in fact which satisfies the traditional test.

It is well settled that an organization may have standing to sue as the representative of its members, based on injury to its members or any one of them.[24] Appellants have satisfied this requirement by alleging injury to the recreational, aesthetic, scientific, and educational interests of their members.

It is also well settled that harm to interests of this type may amount to an injury in fact sufficient to lay the basis for standing.[25] In *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), the Supreme Court stated:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality

[24] *Warth v. Seldin, supra* note 12, 422 U.S. at 511; *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *NAACP v. Button*, 371 U.S. 415, 428 (1963).

[25] *United States v. SCRAP*, 412 U.S. 669, 686 (1973); *Sierra Club v. Morton, supra* note 24, 405 U.S. at 734.

> of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. * * *

The District Court agreed that appellants' interests were cognizable, but it held that appellants lacked standing because there was no showing that they were "on any different footing from any other concerned citizen." [26] But the Supreme Court has clearly stated that this is not a ground for denying standing. In *United States v. SCRAP* the Court said:

> Nor, we said [in *Sierra Club*], could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury. * * *
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> * * * [A]ll persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. * * * To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.[27]

The District Court also found that appellants' injury was insufficient to confer standing because, even if they sought to observe the seals in South Africa, they could be prevented from doing so by the government of South Africa. Appellants submitted affidavits of several of

[26] JA Annex E at 3.

[27] 412 U.S. at 686-688. *Accord, Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 229 (1974) (Stewart, J., concurring).

their members stating that they had gone in the past, or planned to go in the future, to South Africa to observe the fur seals. This is the kind of allegation which the Supreme Court approved as sufficient in *Sierra Club*.[28] Plaintiffs there were not required to prove that no contingency might prevent them from using the national forest in the future. Similarly, there is no basis for burdening appellants, as the trial judge would, with the additional requirement of demonstrating "that the permission of the South African Government has been secured." [29] Surely it cannot be presumed that South Africa will prevent all of appellants' members from observing any seals in the future.

Appellees make much of the fact that appellants' affidavits describe only two members who have travelled to South Africa to view the seals in the past, and one who plans to do so in the future. But it is well settled that standing does not depend on the size or quantum of harm to the party. The Supreme Court has stated, "The association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action * * *." [30] Further, in *United States v. SCRAP* the Court directly addressed this argument:

> The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a

[28] *Sierra Club v. Morton, supra* note 24.

[29] JA Annex E at 3 n.1.

[30] *Warth v. Seldin, supra* note 12, 422 U.S. at 511 (emphasis added).

> litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, * * * a $5 fine and costs, * * * and a $1.50 poll tax * * *. * * * [31]

2. *Causation*

A second [32] prerequisite to standing which has recently emerged is a showing of a sufficient causal relationship between the challenged act and the alleged injury. A party must show that his injury reasonably can be said to have resulted from defendant's alleged statutory infraction.[33] Put another way, he must show that "there is a substantial probability" that, if the court affords the relief requested, his injury will be removed.[34] Standing will be denied if the causal relationship is, in the court's view, "purely speculative." [35]

Appellees contend that appellants fail this test because there is no causal relationship between the Government's alleged failure to enforce the MMPA and South Africa's seal harvesting practices. Strict enforcement of the moratorium on importing sealskins, they contend, would have

[31] 412 U.S. at 689 n.14 (citations omitted).

[32] This test may be viewed as part of the injury in fact requirement, but we separate it here for the sake of clarity. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); Note, *The Causal Nexus: What Must be Shown for Standing to Sue in Federal Courts*, 29 U. FLA. L. REV. 250 (1977).

[33] *Simon v. Eastern Kentucky Welfare Rights Organization, supra* note 32; *Warth v. Seldin, supra* note 12; *Linda R. S. v. Richard D., supra* note 12.

[34] *Warth v. Seldin, supra* note 12, 422 U.S. at 504.

[35] *Simon v. Eastern Kentucky Welfare Rights Organization, supra* note 32, 426 U.S. at 42.

no effect on the well-being of seals in South Africa; South Africa would go right on killing seals less than eight months old or nursing, and killing seals in an inhumane manner, even if the resultant sealskins could not be imported into the United States.

As a factual matter, this argument must fail. We know that prior to deciding the terms of the waiver there were extensive negotiations between officials of the Department of Commerce and the South African government.[36] There is a letter in the record from the Director of Sea Fisheries for the South African government, responding to a Commerce Department inquiry about Fouke's application for a waiver. In explaining his government's sealing practices he states:

> No new or amended laws and regulations pertaining to sealing have become effective since August 1, 1975. The draft regulations covering harvesting methods which were drawn up during 1975 were initially held in abeyance pending a study of additional information and guidance on this subject arising out of the September 1975 hearing in Washington and your waiver regulations. * * * [37]

Further, one of appellees' own arguments on the merits defeats their argument on causation. To succeed on the merits of justifying the waiver of the moratorium, appellees must show, among other things, that South Africa's program for taking fur seals is consistent with the

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[36] *Diggs v. Richardson,* —— F.2d —— (D.C. Cir. No. 75-1775, decided Dec. 17, 1976) (held: allegation that Government dealings with South Africa concerning importation of sealskins from Namibia violate United Nations Security Council resolution that South African occupation of Namibia is illegal was not justiciable).

[37] JA Annex K.

provisions and policies of the MMPA.[38] In its effort to demonstrate this, appellee Fouke states in its brief:

> (2) *Age/Nursing.* South Africa's Sea Birds and Seals Protection Act provides that the Sea Fisheries Branch may restrict seal harvesting on the basis of the seals' age, size and sex. In 1975, acting under this authority, the Sea Fisheries Branch delayed the start of harvesting at most rookeries *in order to accommodate the MMPA standards on age and nursing* * * *. * * *
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> These measures evince a commitment by South Africa to adhere to the standards of the MMPA. * * * [39]

In the face of these statements and the evidence in the record, appellees' contention that South Africa is oblivious to whether its seal harvest can be imported into the United States must fail.

In addition, we believe that Congress, in enacting the MMPA, established as a matter of law the requisite causal relationship between American importing practices and South African sealing practices. The MMPA addresses not only the killing of marine mammals by Americans but also the importation of them. This reflects a congressional decision that denial of import privileges *is* an effective method of protecting marine mammals in other parts of the world. This conclusion is supported by the legislative history.[40]

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[38] 16 U.S.C. § 1371(a)(3)(A) (Supp. V 1975).

[39] Fouke brief at 40-41 (emphasis added).

[40] S. Rep. No. 863, *supra* note 17, at 11. The report states:

> The committee considers that the adoption of this bill will place the United States in a position of world leadership in protection and conservation of marine mammals. The committee wishes to emphasize the need for international cooperation. * * * Moreover, with sealing in the

In the face of this congressional determination, it is impossible to conclude, as appellees urge us to, that the causal relationship is "purely speculative." [41] As we have seen, there is also substantial factual evidence in the record of this case that South African sealing practices *will* respond to stricter enforcement of the MMPA. Therefore we hold that appellants do satisfy the causation test for standing.[42]

3. *Zone of Interests*

The third test for standing is whether "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated

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Antarctic a pending reality, even further communication and cooperation are needed between nations to prevent an increased slaughter of these animals for commercial purposes without a complete understanding of the population dynamics of those animals in that part of the world. It is believed that this legislation can provide a start to assure that future generations will be able to enjoy a world populated by all species of marine mammals.

[41] *Cf. Simon v. Eastern Kentucky Welfare Rights Organization, supra* note 32.

[42] In *Eastern Kentucky* the Court demanded an extremely high degree of proof of causation and found it wanting. Two factors distinguishing that case from this one suggest that the Court would not impose as rigid a burden on our appellants. First, in *Eastern Kentucky* the plaintiffs attempted to challenge IRS action affecting the tax status of third parties under a statute which was completely silent as to any right to judicial review. The MMPA, by contrast, contains an explicit grant of judicial review. Second, tax cases have traditionally been treated as a special class to which both Congress and the courts have applied the most rigorous threshold requirements for judicial review. While the Court did not explicitly rely on this factor, it is an aspect of the case which we cannot ignore. *See* 426 U.S. at 36-37.

by the statute or constitutional guarantee in question." [43] Neither appellees nor the District Court dispute the fact that appellants satisfy this test. Indeed, the MMPA was enacted at the urging of appellant organizations,[44] and the declaration of policy contained in the Act makes clear that appellants' interests are precisely those which Congress sought to protect:

> [M]arine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. * * * [45]

III. The Merits

A. *Age Limitation*

Appellants charge that the Government appellees' decision to waive the moratorium is illegal in four respects. The first is that it would permit importation of sealskins from animals that were less than eight months old

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[43] *Ass'n of Data Processing Service Organizations, Inc. v. Camp, supra* note 23, 397 U.S. at 152-153.

[44] For example, appellants Defenders of Wildlife, Friends of the Earth, Inc., Fund for Animals, Inc., Humane Society of the United States, and International Fund for Animal Welfare were active in urging enactment of the MMPA and their representatives testified on the legislation before its passage and at oversight hearings on the MMPA since 1972. Complaint ¶¶ 4-8, JA Annex B at 3-6.

[45] 16 U.S.C. § 1361(6) (Supp. V 1975).

at the time of taking, in contravention of Section 102 (b) (2) of the MMPA."[46]

In the waiver decision and the regulations implementing it the Government defined eight months old to mean "eight months old as determined by using a mean birthdate for the Cape fur seal of December 1 for any one pupping season."[47] Thus the Government deems any seal killed on or after August 1 each year old enough to be imported. The Government defends this regulation on the ground that some such method for determining the age of animals in the wild is a practical necessity. We agree, but the method chosen by the Government blatantly violates the Act.

It is undisputed that the annual pupping season for Cape fur seals is from November to December. Five percent of the new seals are born by November 14, 50 percent by December 1, and 95 percent by December 18. The Government considered these data and deliberately chose a formula which permits fully *half* the seals imported to be *less than* eight months old when killed. This interpretation flatly contradicts the plain language of the statute: "it is unlawful to import into the United States *any* marine mammal if *such* mammal was * * * less than eight months old * * *."[48] The legislative history confirms that Congress meant to refer to individual animals, not groups or populations with a mean age of eight

[46] 16 U.S.C. § 1372(b) (2) (Supp V 1975). The statute prohibits importation of marine mammals and marine mammal products if the animal was "nursing at the time of taking, or less than eight months old, whichever occurs later."

[47] 50 C.F.R. § 216.32(d) (2) (1976).

[48] 16 U.S.C. § 1372(b) (Supp. V 1975) (emphasis added). Section 1372(c) (2) extends the prohibition to any product from a marine mammal whose importation would be unlawful.

months."[49] This is also the view of the Marine Mammal Commission, an expert body created by the MMPA to advise the Secretary of Commerce.[50]

We agree with the Government "that it is impossible to avoid entirely the chance that a *single* sealskin might be imported from an underage seal."[51] But, faced with this problem, the Government has decided to allow *half* the sealskins imported to be from underage seals. This formula is so far from meeting the statutory standard that it must be rejected.[52]

B. *Nursing*

The statute also prohibits importation of sealskins from animals who were "nursing at the time of taking * * *."[53] The Government determined that this provision, like the age limitation, would be impossible to administer unless the agency established some general standard for all seals. In the waiver and regulations the Government set such a standard: first, it ruled that "nursing" means "nursing which is obligatory for the physical health and survival of the nursing animal";[54] second, it ruled that each and

[49] 118 CONG. REC. 7689 (March 9, 1972).

[50] Administrative brief of Marine Mammal Commission at 12, *quoted in* appellants' brief at 23.

[51] Government brief at 15 (emphasis added).

[52] While we do not decide what date the Government could lawfully establish, it appears on the basis of the data before us that December 18, when about 95% of the seals have been born, would be a logical choice; thus all seals could be deemed to be at least eight months old if they are killed on or after August 18 each year.

[53] 16 U.S.C. § 1372(b) (2) (Supp. V 1975).

[54] 50 C.F.R. § 216.32(d) (4) (1976).

every seal has ceased obligatory nursing by August 1.[55] Appellants contend that there is nothing in the statute or the legislative history to justify the distinction between "obligatory" and "convenience" nursing and that, in any event, all seals have not ceased obligatory nursing by August 1.

In order to decide whether the Government's distinction is consistent with the statute, it is necessary to know what the purpose of the "nursing" prohibition was. Why was Congress concerned about the killing of nursing animals? The legislative history sheds little light on this question. But the parties agree the restriction does not relate to reproduction or maintenance of the seal population, because seals do not reproduce until at least a year after they have ceased all nursing. Rather, it appears that Congress was responding to an emotional conviction that killing babies who were still nursing was intolerably cruel. The legislative history speaks of "public indignation" and "public opinion." [56] Nursing seems to have been used as a measure of infancy, of vulnerability and helplessness. While it is admittedly unusual to find a statutory purpose based entirely on emotional concerns, it is perfectly proper in the context of a statute which also prohibits killing in an "inhumane" manner, where humane is defined as involving "the least possible degree of pain and suffering practicable to the mammal involved." [57] There is surely no "resource management" explanation for this provision; nor is there, as far as we know, for the nursing prohibition.

Assuming then that the statute responded to emotional concerns, there is clearly no justification for the technical

[55] 50 C.F.R. § 216.32(e)(1)(ii)(C) (1976); 41 FED. REG. 7511 (1976).

[56] S. Rep. No. 863, *supra* note 17, at 2, 5.

[57] 16 U.S.C. §§ 1372(b)(4), 1362(4) (Supp. V 1975).

distinction between obligatory and convenience nursing which the Government grafted onto the statute. The statute is plain; it bars importation of any animal which was "nursing at the time of taking." It is undisputed that seals cease all nursing by October each year, when the mother seals leave the rookeries. Therefore, as in the case of age, there was available to the Government a workable, standard method of applying the provision. Instead, the Government invented a distinction whose only purpose was to allow more importation of seals.[58] As the Marine Mammal Commission stated in opposing the Government's decision:

> As in the case of mean date of birth, the concept of obligate nursing is necessary in order to resolve a special problem faced by the applicant and is not necessary in order to remedy any fatal defect in the Act. * * *
>
> * * * Contrived arguments that the applicant can import an animal which was killed because it did not *need* to nurse in order to survive but was only doing so as a *convenience* [are] irrelevant and inadequate

[58] The regulation followed a report by a National Marine Fisheries Service representative, who had visited South Africa, that nursing

> is the critical question regarding a waiver of the moratorium under the Marine Mammal Protection Act. During this trip, the stomachs of 20 seals were examined. The majority contained no food while one contained milk, indicating some seals were still nursing. The final resolution of the question would seem to depend upon either one of two actions:
>
> 1. An amendment of the Act, or
> 2. A legal determination that the Act refers to obligatory nursing only and a biological determination that obligatory nursing is completed by a predetermined date.

Annex D to Plaintiffs' Motion for Preliminary Injunction of March 24, 1976.

> for purposes of satisfying the categorical, unqualified statutory mandate of Section 102(b)(2) * * *.[59]

Because we reject the Government's use of the obligatory nursing concept to narrow the unambiguous command of the statute, we do not reach the question of when obligatory nursing ceases.[60]

C. *Humane Manner*

Appellants' third contention is that the Government's decision to waive the moratorium is illegal in that it allows importation of seals taken in an inhumane manner, in violation of Section 102(b)(4) of the Act.[61] Humane is defined to mean "that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved." [62]

The parties agree that the most humane method of killing is the so-called "stun and stick" method. The method involves three stages: (1) the roundup drive; (2) clubbing the animal so as to render it unconscious; and (3) severing the great arteries or heart with a knife to kill the animal quickly. The parties also agree that this is the method used in South Africa, but appellants claim that it is not properly put into practice there. Appellants contend that humaneness requires that each

[59] Administrative brief of Marine Mammal Commission at 14-15, *quoted in* appellants' brief at 28 (emphasis in appellants' brief).

[60] We also do not decide what date the Government could lawfully establish for the termination of all nursing. As we noted *supra* in our discussion of age, it may be necessary as a practical matter to fix a date which allows importation of a *few* nursing seals. What we do hold is that any date fixed solely by reference to obligatory nursing is invalid.

[61] 16 U.S.C. § 1372(b)(4) (Supp. V 1975).

[62] 16 U.S.C. § 1362(4) (Supp. V 1975).

seal be rendered instantly and permanently unconscious by a single blow. They cite testimony that in South Africa as many as 40 percent of the seals required a second blow. They also allege that practices at harvests where no observers are present can be presumed to be worse than those observed by the witnesses.

Unlike appellants' claims regarding age and nursing, which involved questions of statutory interpretation, their humaneness contention involves only a finding of fact. The Director of the National Marine Fisheries Service made a determination on the administrative record that the South African harvest was conducted in a humane manner. Our role in reviewing this finding is limited; we can reject it only if it is not supported by substantial evidence.[63] While we might agree that South Africa's record of stunning seals with a single blow could certainly be improved,[64] we cannot say that the Director's finding is not supported by substantial evidence on the record as a whole. There was expert testimony that multiple blows were not necessarily inhumane, provided they were delivered within a minimal period of time. Two out of three observers concluded that the harvest they observed was, overall, humane. And the record before us provides no solid support for appellants' speculation that other harvests were undoubtedly worse. Therefore, we affirm the Director's finding on this point.

D. *Consistency with the MMPA*

The MMPA provides that

> no marine mammal or marine mammal product may be imported into the United States unless the Secre-

[63] 5 U.S.C. § 706(2)(E) (1970); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

[64] Appellants point out that at the American seal harvest in the Pribilof Islands a second blow is required to render the seal unconscious in less than 5% of the clubbings.

> tary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this chapter. * * * [65]

The Secretary did so certify in the decision to waive the moratorium,[66] but appellants contend that the certification is invalid because the record does not support a finding that South Africa's sealing practices are consistent with the provisions and policies of the MMPA.

Our decision on this claim is dictated by our holdings on appellants' other claims. Even if we assume that South Africa killed no seals prior to August 1,[67] as dictated by the Government appellees' construction of the age and nursing provisions of the Act, the record shows that up to 50 percent of them were less than eight months old and many of them were still nursing. The Government used its mean birthdate and obligatory nursing constructs to legitimate these killings, but we have held that the Government interpretations do not comply with the Act. It is therefore clear that South Africa's sealing program is not consistent with the provisions of the MMPA, in that South Africa kills many animals which are nursing or less than eight months old at the time of taking.

Appellants offer as an additional ground for invalidating the certification the fact that the MMPA is based on a policy of "optimum sustainable population" (OSP) while South Africa's sealing program is based on a policy of "maximum sustainable yield" (MSY). Both OSP and MSY are efforts to quantify how many animals can be taken each year without depleting the population. How-

[65] 16 U.S.C. § 1371(a)(3)(A) (Supp. V 1975).

[66] 41 FED. REG. 7539 (1976).

[67] Appellants assert that the harvest began as early as June at some sites.

ever, both are exceedingly difficult to apply with any precision. The MMPA sets as a goal "to obtain an optimum sustainable population keeping in mind the optimum carrying capacity of the habitat."[68] But in our view the definitions of both OSP and optimum carrying capacity are singularly unenlightening; each is defined in terms of the other.[69] The Government, conceding that it has had trouble with the terms, has decided that OSP is not a fixed population level at all but a population range.[70]

We are reluctant to jump into this fray. The Director found that the South African seal population is healthy and growing and that what South Africa is trying to achieve via MSY—a healthy seal herd in a balanced ecosystem—is consistent with what the MMPA seeks to achieve via OSP. Appellants disagree, saying that MSY inherently means harvesting more animals than OSP. But appellants admit that they too do not really know what either term means,[71] and they do not deny that the seal herds are growing under South African management. On the basis of this cloudy record, we

[68] 16 U.S.C. § 1361 (Supp. V 1975).

[69] 16 U.S.C. § 1362 reads in part:

> (8) The term "optimum carrying capacity" means the ability of a given habitat to support the optimum sustainable population of a species or population stock in a healthy state without diminishing the ability of the habitat to continue that function.
>
> (9) The term "optimum sustainable population" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

[70] Government brief at 32.

[71] Appellants' brief at 44.

cannot conclude that MSY is definitely inconsistent with OSP. We do not foreclose the question for the future, however, when experience and sharper definitions might require a different conclusion.

IV. Conclusion

We reverse the District Court's decision that appellants lacked standing to bring this suit. On the merits, we hold that the Government's decision to waive the moratorium on importation of baby fur sealskins contravenes the MMPA in that it permits importation of skins taken from animals who were less than eight months old or who were nursing at the time of taking. For the same reason the Secretary's certification that South Africa's sealing program is consistent with the provisions and policies of the MMPA is invalid. Accordingly, the waiver decision and the regulations implementing it are hereby set aside.

Reversed.